

## Durham Research Online

---

### Deposited in DRO:

19 January 2016

### Version of attached file:

Accepted Version

### Peer-review status of attached file:

Peer-reviewed

### Citation for published item:

Cabrelli, David and Siems, Mathias (2015) 'Convergence, legal origins and transplants in comparative corporate law : a case-based and quantitative analysis.', *American journal of comparative law.*, 63 (1). pp. 109-153.

### Further information on publisher's website:

<http://dx.doi.org/10.5131/AJCL.2015.0004>

### Publisher's copyright statement:

This is a pre-copyedited, author-produced PDF of an article accepted for publication in *American journal of comparative law* following peer review. The version of record [insert complete citation information here] is available online at: <http://dx.doi.org/10.5131/AJCL.2015.0004>

### Additional information:

---

### Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

# **Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis**

David Cabrelli and Mathias Siems

Final version of this paper published in  
*American Journal of Comparative Law*,  
vol. 63 (2015), pp. 109-153

*Abstract:* In this Article, we intend to fill a gap in the comparative law literature by adopting a case-based approach to comparative corporate law that highlights the important dimension of specific cases in corporate law matters and how identifiable, but limited issues arising from such case disputes are resolved in different jurisdictions. Our study is based on ten cases used in a wider research project and their solutions in ten countries: eight European countries, the United States, and Japan. We assess the solutions to these cases using quantitative methods of network and cluster analysis. We also seek to enquire whether conceptual differences exist between countries in terms of the source, form, style, and substance of the legal rules which comprise their corporate laws.

The findings of this assessment are used to evaluate arguments developed in the academic comparative company literature which posit that the existence of fundamental differences in the protection of shareholders across countries reduces the scope for convergence in corporate law systems. The case-based evaluation is also applied to make a contribution towards other influential theories in comparative law, particularly the “legal origins” theorem and the “legal transplants” debate. For example, while we find some evidence of legal transplants, we will show that the notion of legal origins has only limited value in today’s corporate law. Furthermore, the research has a public policy dimension since the existence or absence of differences matters for the question of whether formal harmonization of corporate law in the EU, or further afield, is necessary, desirable, or at all possible.

*Keywords:* company law, comparative law, comparative corporate governance, comparative corporate law, convergence, legal transplants, legal origins

*JEL Classification:* G34, K22, N20, O16, O57

## Table of Contents

INTRODUCTION .....	3
I. CENTRAL DEBATES IN COMPARATIVE CORPORATE LAW .....	6
<i>A. Introduction</i> .....	6
<i>B. Convergence, Divergence, and Corporate Governance Systems</i> .....	7
<i>C. Legal Origins and Related Taxonomies</i> .....	11
<i>D. Legal Transplants in Corporate Law</i> .....	19
II. THE PROJECT, ITS CASES, AND ITS COMPONENTS .....	21
<i>A. Introduction</i> .....	21
<i>B. The Case-Based Method and Practicalities</i> .....	22
<i>C. The Ten Hypothetical Cases</i> .....	25
<i>D. The Coding of the Twenty Components</i> .....	28
III. MAIN COMPARATIVE FINDINGS.....	30
<i>A. Introduction</i> .....	30
<i>B. Comparison of Legal Rules</i> .....	31
<i>C. Comparison of Underlying Sources of Law</i> .....	36
<i>D. Comparison of Results</i> .....	42
<i>E. The Relationship between Legal Rules, Sources of Law, and Results</i> .....	48
SUMMARY AND CONCLUSIONS .....	53

# Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis

DAVID CABRELLI & MATHIAS SIEMS\*

## INTRODUCTION

The global financial crisis of 2008 led to a stagnation, or even a decrease, in international investments and cross-listings.<sup>1</sup> However, this situation seems to be in the process of changing once again. Since the 2013 report accompanying the KOF Index of Globalization observes a slight recovery in the onward march of economic globalization,<sup>2</sup> it can be expected that the internationalization of companies will also continue. It therefore remains crucial to understand how and why corporate laws differ across countries and how improvements, based on national or international models, may be made. The drive to enhance corporate laws and corporate governance standards is also reflected in the 2014 consultation by the Organization for Economic Co-operation and Development (OECD), which has

---

\* David L. Cabrelli, Senior Lecturer in Commercial Law, University of Edinburgh, United Kingdom. Mathias M. Siems, Professor of Commercial Law, University of Durham, United Kingdom. This article is based on Chapters 1 and 12 of *COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH* (Mathias Siems & David Cabrelli eds., 2013). We are grateful to Hart Publishing for their permission to reproduce this material in modified form in this article, as well as to our national reporters who provided the raw data on which our findings are based. The authors would also like to thank the anonymous reviewer and those present at the seminar at VU University, Amsterdam, the Netherlands, on Jan. 23, 2014 for their contributions.

<sup>1</sup> Data are published by, e.g., the OECD, the World Bank, and the World Federation of Exchanges. See *Guide to OECD International Direct Investment Statistics*, UK DATA SERVICE, <http://ukdataservice.ac.uk/use-data/guides/dataset/international-investment.aspx>; *Indicators*, WORLD BANK, <http://data.worldbank.org/indicator>; *Statistics*, WORLD FEDERATION OF EXCHANGES, <http://www.world-exchanges.org/statistics>.

<sup>2</sup> Press release, Mar. 1, 2013, available at <http://globalization.kof.ethz.ch/>.

launched a review of its 2004 Principles of Corporate Governance in order to consider “recent developments in the corporate sector and capital markets.”<sup>3</sup>

The primary objective of this Article is to add to the existing academic literature in the field of comparative corporate law,<sup>4</sup> albeit by adopting a novel methodological approach to the subject. Up until twenty years ago, the academic literature on comparative corporate law tended to focus on the institutional structure of the corporation. For instance, discussions centered around whether companies had only one board of directors (“one-tier systems”) or whether there was a distinction between the management and supervisory board (“two-tier systems”),<sup>5</sup> whether companies should establish committees (remuneration, appointment, audit committees etc.), the identity of persons who could be appointed as a company’s auditor (independence, qualification etc.), and the division of powers between the board of directors and the shareholders in general meeting. While this approach is important, it overlooked the dimension of specific cases in corporate law matters and how the issues arising from disputes were resolved in different jurisdictions. In recent years, the research agenda has moved on to analyze specific thematic topics in more detail from a comparative perspective, such as takeovers,<sup>6</sup> derivative suits,<sup>7</sup> and self-dealing.<sup>8</sup> In this Article

---

<sup>3</sup> See *OECD Principles of Corporate Governance*, OECD, <http://oecd.org/corporate/oecdprinciplesofcorporategovernance.htm>. For a discussion of the OECD Principles see Mathias Siems & Oscar Alvarez-Macotella, *The OECD Principles of Corporate Governance in Emerging Markets: A Successful Example of Networked Governance?*, in NETWORKED GOVERNANCE, TRANSNATIONAL BUSINESS AND THE LAW 257 (Mark Fenwick, Steven Van Uytsel & Stefan Wrba eds., 2014).

<sup>4</sup> The main general books on comparative corporate law are: MADS ANDENAS & FRANK WOOLDRIDGE, *EUROPEAN COMPARATIVE COMPANY LAW* (2009); RADO BOHINC, *COMPARATIVE COMPANY LAW: AN OVERVIEW ON US AND SOME EU COUNTRIES’ COMPANY LEGISLATION ON CORPORATE GOVERNANCE* (2011); ANDREAS CAHN & DAVID C. DONALD, *COMPARATIVE COMPANY LAW* (2010); ALAN DIGNAM & MICHAEL GALANIS, *THE GLOBALIZATION OF CORPORATE GOVERNANCE* (2009); *CORPORATE GOVERNANCE IN CONTEXT* (Klaus J. Hopt, Eddy Wymeersch, Hideki Kanda & Harald Baum eds., 2005); REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW* (2d ed. 2009); *CORPORATE GOVERNANCE REGIMES—CONVERGENCE AND DIVERSITY* (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers & Luc Renneboog eds., 2002); *COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS* (Andreas M. Fleckner & Klaus J. Hopt eds., 2013).

<sup>5</sup> See, e.g., *CORPORATE BOARDS IN LAW AND PRACTICE: A COMPARATIVE ANALYSIS IN EUROPE* (Paul Davies, Klaus Hopt, Richard Nowak & Gerard van Solinge eds., 2013); Paul Davies & Klaus J. Hopt, *Boards in Europe—Accountability and Convergence*, 61 AM. J. COMP. L. 301 (2013).

<sup>6</sup> John Armour & David Skeel, *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of US and UK Takeover Regulation*, 95 GEO. L.J. 1727 (2007).

<sup>7</sup> *THE DERIVATIVE ACTION IN ASIA: A COMPARATIVE AND FUNCTIONAL APPROACH* (Dan W. Puchniak, Harald Baum & Michael Ewing-Chow eds., 2012); ARAD REISBERG, *DERIVATIVE ACTIONS AND CORPORATE GOVERNANCE: THEORY AND OPERATION* (2007); X. LI, *A COMPARATIVE STUDY OF SHAREHOLDERS’ DERIVA-*

we intend to follow in the same vein as that more recent non-structural and thematic academic literature to subject specific issues related to directors' liability, creditor protection, and shareholders' rights and duties to the scrutiny of a comparative assessment. One of the fundamental points to be made is that comparative similarities, differences, and trends in these topics may be best understood by analyzing how carefully designed hypothetical cases would be solved in different countries.

In the project underlying this Article, the laws of ten distinct jurisdictions—namely Spain, Italy, Germany, the United Kingdom, Poland, Finland, Latvia, France, the United States (Delaware was used as a proxy), and Japan—were addressed by national reporters we appointed for this purpose. Each national reporter solved ten hypothetical cases according to their national law.<sup>9</sup> The project, methodology, findings, and conclusions were set out in a book published in 2013. The process adopted is akin to the influential case-based comparative methodology used by the so-called Common Core project.<sup>10</sup> However, the Common Core only examines private law in a narrow sense (contract, tort, etc.). Therefore, our project aimed to fill a gap in the comparative law literature by adopting a similar approach in the field of corporate law.<sup>11</sup>

The present Article uses this comparative information in order to enquire whether conceptual differences exist between countries in terms of the source, form, style, or substance of the legal rules which comprise their corporate laws. The findings of this assessment can be used to evaluate arguments developed in the academic literature which posit that the existence of fundamental differences in the protection of shareholders across coun-

---

TIVE ACTIONS (2007); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1764 (2004); Pearlie K.M. Choo, *The Statutory Derivative Action in Singapore—A Critical and Comparative Examination*, 13 BOND L. REV. 81 (2001); Mark D. West, *The Pricing of Shareholder Derivative Actions in Japan and the United States*, 88 NW. U. L. REV. 1439 (1994); Deborah A. Demott, *Shareholder Litigation in Australia and the United States: Common Problems, Uncommon Solutions*, 11 SYDNEY L. REV. 259 (1988).

<sup>8</sup> Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008).

<sup>9</sup> COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH (Mathias Siems & David Cabrelli eds., 2013). See also the reviews by Richard C. Nolan, 130 LAW Q. REV. 343 (2014); Demetrio Maltese, 72 CAMBRIDGE L.J. 768 (2013); Peter Watts, NEW ZEALAND L.J. 318 (2013). See also *infra* Part II.

<sup>10</sup> COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, 16-18

<sup>11</sup> See *supra* note 4 for existing works on comparative corporate law.

tries reduces the scope for convergence in corporate law systems.<sup>12</sup> The results can also reveal the constituencies (directors, minority shareholders, majority shareholders, creditors, etc.) preferred in the cases in the differing jurisdictions, which can be plotted and evaluated. The case-based evaluation is also applied to make a contribution towards other influential theories in comparative law, particularly the “legal origins” theorem and the “legal transplants” debate. Furthermore, the research has a public policy dimension since the existence or absence of differences matters for the question of whether formal harmonization of corporate law in the European Union (EU) or further afield is necessary, desirable, or at all possible.<sup>13</sup>

To set the scene, Part I outlines central debates in the comparative corporate law literature and how the ten cases drawn have the potential to provide useful insights into the relevance and soundness of the arguments advanced in terms of those debates. Part II explains the case-based approach in more detail. In particular, the focus is on the form, style, and substance of the ten cases, within the rubric of the following themes: (1) directors’ liability; (2) creditor protection; and (3) shareholders’ rights and protection and the flexibility of corporate law. This Part also considers the method and practicalities of adopting a comparative case-based approach, as well as the coding of twenty components from the ten cases. In Part III, the focus shifts to the main findings of the case-based research, including some of the implications of the results for salient debates in the area of comparative corporate law. Finally, the Article ends with a brief summary and conclusion.

## I. CENTRAL DEBATES IN COMPARATIVE CORPORATE LAW

### *A. Introduction*

One of the principal objectives of the case-based research we adopt is to identify and understand possible differences and similarities between legal systems in corporate

---

<sup>12</sup> For references on the convergence debate, *see infra* notes 14–17.

<sup>13</sup> For the EU debate see, e.g., *Modernisation of Company Law and Enhancement of Corporate Governance*, EUROPEAN COMMISSION, [http://ec.europa.eu/internal\\_market/company/modern/index\\_en.htm](http://ec.europa.eu/internal_market/company/modern/index_en.htm).

law. By identifying the affinities between corporate law regimes as well as the extent, nature, and scope of the disparities, the project has the potential to offer insights into the validity of three of the most central ongoing debates in the field of comparative corporate law: the “convergence versus divergence,” the “legal origins,” and the “legal transplants” debates. All of these debates are cross-cutting and overlap to some degree, which may be attributed to the fact that each of them at some level addresses the extent to which a single, carefully prescribed framework can ever function as the optimal “default operating system” of corporate law.

In the remainder of Part I, we discuss these three debates. In addition, the final paragraphs of the next three subsections consider how the case-based approach of this Article (and its underlying project) has the potential to add important insights to these debates.

### ***B. Convergence, Divergence, and Corporate Governance Systems***

First, the findings of the research have the capacity to make a contribution towards the “convergence versus divergence” debate in corporate law. The key work in this vein is the article by Henry Hansmann and Reinier Kraakman which argued that the shareholder-oriented model of modern U.S. corporate law would ultimately “win out” in a competition with the more traditional managerial model of U.S. corporate law and the stakeholder- and state-oriented models of civil law countries.<sup>14</sup> Indeed, there is evidence that the legal systems of continental Europe and Asia have copied investor-related provisions from U.S. law, without there being a converse feedback into U.S. law. Thus, lawmakers in other countries are keen to improve the potential of their companies to attract capital, due to intensified international competition. U.S. law is particularly influential here as large foreign companies are often listed on U.S. markets, U.S. institutional investors have special weight, and the United States can exert political pressure as a world power.<sup>15</sup> Further, particular studies

---

<sup>14</sup> Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001). See also *infra* Parts III.D and IV.

<sup>15</sup> MATHIAS M. SIEMS, CONVERGENCE IN SHAREHOLDER LAW 226–27 (2008).



have supplied evidence of convergence,<sup>16</sup> with a number of factors such as securities law and stock market requirements coalescing to dilute the differences between corporate law regimes across the world.<sup>17</sup> This convergence is partly attributable to the growth of globalization and, in particular, the pressures exerted by competition, interest groups, and imitation.

It is no exaggeration to say that Hansmann and Kraakman's article generated a formidable reaction amongst comparative corporate law scholars across the world. But many contested their arguments. Some scholars objected that path dependencies still play an important role. As regards the law, this may be the result of fundamentally different legal mentalities between common and civil law countries,<sup>18</sup> and in terms of corporate governance, historical and cultural differences may persist, reflecting different types of market economies.<sup>19</sup> Proponents of "path-dependence" theory argue that the structure of a jurisdiction's corporate governance system and the shape of its corporate laws are conditioned by its cultural, social, economic, and political past.<sup>20</sup> Hence, "history matters," since once a jurisdiction has embarked upon a particular path, legal systems become "locked in" and conditioned by institutions built up within the system over the years. As a result, strong complementarities between different institutions in the system are generated, rendering it

---

<sup>16</sup> The scholarship has pointed to a myriad of diverse possible modes of convergence, such as "formal," "functional," "contractual," "hybrid," "normative," and "institutional" convergence. See the various contributions in Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329, 337–50 (2001); Paul Rose, *EU Company Law Convergence Possibilities After Centros*, 11 TRANSNAT'L L. & CONTEMP. PROBS. 121, 134–35 (2001); Curtis J. Milhaupt, *Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance*, 149 U. PA. L. REV. 2083, 2125–28 (2001); David Charny, *The German Corporate Governance System*, COLUM. BUS. L. REV. 145, 165 (1998). For different forms of convergence see also SIEMS, *supra* note 15, 23–24.

<sup>17</sup> For the debate, see, e.g., John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 679–80 (1999); Douglas M. Branson, *The Very Uncertain Prospect of "Global" Convergence in Corporate Governance*, 34 CORNELL INT'L L.J. 321 (2001); CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE 2-6 (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

<sup>18</sup> Cf., not specifically on corporate law, PIERRE LEGRAND, *LE DROIT COMPARÉ* (2006); Pierre Legrand, *European Legal Systems are not Converging*, 45 INT'L & COMP. L.Q. 52 (1996).

<sup>19</sup> See, e.g., THOMAS CLARKE, *INTERNATIONAL CORPORATE GOVERNANCE: A COMPARATIVE APPROACH* 266 (2008); Branson, *supra* note 17, at 321.

<sup>20</sup> See BRIAN CHEFFINS, *CORPORATE OWNERSHIP AND CONTROL: BRITISH BUSINESS TRANSFORMED* 55–56 (2008); Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 653–60 (1996); Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When Do Institutions Matter?*, 74 WASH. U. L. Q. 327, 329–34 (1996); Coffee, *supra* note 17, at 646–47, 660–61.

difficult and inefficient for that jurisdiction to suddenly shift direction by introducing an altogether novel set of institutions. For this reason, “path-dependence” proponents argue that the uniqueness of corporate governance systems ought to be strengthened and permitted to evolve organically in accordance with the existing legal, political, social, and economic infrastructure.<sup>21</sup> More nuanced positions are also possible. For instance, it could be said that, today, legal systems do not differ primarily because of different legal families, but rather on account of their belonging to a particular regional group. In particular, this may be the case in Europe, where the EU has harmonized some aspects of corporate law and the Europeanization of economic and legal thinking may also have led to convergence on other topics.

Other commentators have been critical on different grounds. Some have been of the view that the effect of regulatory competition amongst jurisdictions runs counter to convergence, leading inexorably to greater divergence amongst legal systems as each jurisdiction competes and engages in a “race to the bottom” to attract incorporations.<sup>22</sup> Further reasons advanced to explain why we ought to be skeptical about the potential for such convergence include cultural constraints, political-economic barriers, and the variations across jurisdictions in the legal rules addressing the protection of shareholders.

In particular, the arguments against convergence theory are closely connected with the divergence in the structure of share ownership of companies one finds in common law and civil law countries. In the capitalist market economies of common law jurisdictions such as the United Kingdom and the United States—which are categorized as “liberal market economies” in the “varieties of capitalism” literature in the field of comparative political economy<sup>23</sup>—the corporate governance system is referred to as an “outsider/arm’s

---

<sup>21</sup> Lucian Bebchuk & Mark Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 STAN. L. REV. 127 (1999); Udo C. Braendle & Juergen Noll, *On the Convergence of National Corporate Governance Systems*, 17 J. INTERDISC. ECON. 57 (2006); Mark Roe, *Some Differences in Corporate Structure in Germany, Japan and United States*, 102 YALE L.J. 1928 (1993); Gilson, *supra* note 20.

<sup>22</sup> Ronald J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market*, 36 MCGILL L.J. 138 (1991); Rose, *supra* note 16, at 121.

<sup>23</sup> See, e.g., VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter Hall & David Soskice eds., 2001); BEYOND VARIETIES OF CAPITALISM: CONFLICT, CONTRADICTIONS, AND COMPLEMENTARITIES IN THE EUROPEAN ECONOMY (Bob Hancké, Martin Rhodes & Mark Thatcher eds., 2007).

length” system of ownership and control. Ownership of the shares of large public corporations quoted on the capital markets in such systems is widely dispersed, with an absence of dominant controlling shareholders.<sup>24</sup> Some scholars have argued that the main focus of corporate laws in such jurisdictions is on protecting shareholders as a class from conduct of managers and directors that is prejudicial to shareholder interests, given that the latter are in a position to further their own interests at the expense of shareholders. As such, the “agency costs” to be tackled here are of a “vertical” nature in dispersed share ownership systems.<sup>25</sup> Furthermore, a large degree of emphasis is placed on corporate disclosure and market control by outsiders. This can be contrasted with “co-ordinated market economies” in the “varieties of capitalism” literature, where the corporate governance system is “insider/control-oriented” in nature. This taxonomy roughly maps onto the corporate law regimes of the civil law jurisdictions where the share ownership of public corporations is concentrated in a single or a few blockholder controlling shareholders.<sup>26</sup> Such systems are characterized by weak minority shareholder protection, a phenomenon which is largely attributable to the ability of controlling shareholders to extract private benefits by virtue of their dominance and control. Since the governance of companies in such “insider/control-oriented” systems is closely co-ordinated between management and the blockholding controlling shareholders, many commentators<sup>27</sup> contend that corporate law protections in civil law jurisdictions are designed to protect minority shareholders. The argument runs that the “agency costs”

---

<sup>24</sup> See Simon Deakin, Richard Hobbs, Sue Konzelmann & Frank Wilkinson, *Anglo-American Corporate Governance and the Employment Relationship: A Case to Answer?*, 4 SOCIO-ECON. REV. 155, 159–60 (2006); Klaus Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 AM. J. COMP. L. 1, 9 (2011).

<sup>25</sup> See KRAAKMAN ET AL., *supra* note 4, at 29–32, 35–38; CHEFFINS, *supra* note 20, at 4–7.

<sup>26</sup> See, e.g., Marco Becht & Colin Mayer, *Introduction*, in THE CONTROL OF CORPORATE EUROPE (Fabrizio Barca & Marco Becht eds., 2001); Mara Faccio & Larry H. P. Lang, *The Ultimate Ownership of Western European Corporations*, 65 J. FIN. ECON. 365 (2002); Stijn Claessens, Simeon Djankov & Larry H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81 (2000); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006).

<sup>27</sup> See KRAAKMAN ET AL., *supra* note 4, at 29–32, 35–38; Cheffins *supra* note 20, at 4–7; Erik Berglöf, *A Note on the Typology of Financial Systems*, in COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS 151–64 (Klaus Hopt & Eddy Wymeersch eds., 1997); John Armour, Simon Deakin & Sue Konzelmann, *Shareholder Primacy and the Trajectory of UK Corporate Governance*, 41 BR. J. IND. RELAT. 531, 533 (2003); Brian Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle–Means Corporation in the United Kingdom*, in CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 147 (Joseph A. McCahery, Piet Moerland, Theo Raaijmakers & Luc Renneboog eds., 2002).

which arise in civilian “insider/control-oriented” jurisdictions are horizontal, i.e. attributable to a misalignment of the interests of majority shareholders and minority shareholders, rather than a vertical misalignment between the interests of directors and shareholders generally as a class, which is predominant in common law jurisdictions.<sup>28</sup>

The debate as to which of the “outsider/arm’s length” or “insider/control-oriented” systems of ownership and control is superior or more efficient has not been resolved: the jury is still out. With its emphasis on case-based problem-solving across common law and civil law jurisdictions, the approach we pursue in the present article has the potential to test the descriptive relevance of the dichotomy struck in the literature between “outsider/arm’s length” and “insider/control-oriented” systems of corporate governance. If the results point towards the existence of legal techniques in civilian jurisdictions to constrain horizontal agency costs in preference to vertical agency costs, this will furnish some support for the position adopted in the literature. Likewise, if the case-based methodology reveals that common law jurisdictions pay less attention to legal mechanisms whose purpose it is to restrict horizontal agency costs, it will serve to make a contribution to the “convergence versus divergence” debate. The case-based approach is particularly well suited to such an endeavor, since the solutions to the cases across the selected common law and civil law jurisdictions can be compared and contrasted with the constituency favored by each of the solutions duly identified and coded.<sup>29</sup>

### ***C. Legal Origins and Related Taxonomies***

A closely related debate revolves around the relevance of the “legal origins” theorem.<sup>30</sup> This theorem is connected to the wider notion of “legal families” in the general

---

<sup>28</sup> A third kind of “agency cost” is that which arises between shareholders and non-shareholder constituencies such as suppliers, creditors, employees, etc. See KRAAKMAN ET AL., *supra* note 4, at 35–38; Cheffins, *supra* note 20, at 4–7.

<sup>29</sup> See further *infra* Part IV.D.

<sup>30</sup> See, e.g., Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Law and Finance*, 106 J. POLIT. ECON. 1113 (1998); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert Vishny, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000); Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193 (2002); Rafael La Porta, Florencio Lopez-

comparative law literature (as well as path-dependency theory, considered above). Thus, the following starts with a review of the legal family classifications.

The core idea of legal families is that the diversity of legal systems around the world is not random but that groups of countries share common features in terms of legal history, legal thinking, and positive rules. Particular relevance is attributed to the distinction between common and civil law countries: common law and civil law are said to “constitute the basic building blocks of the legal order,”<sup>31</sup> and this distinction is also seen as the “most fundamental and most discussed issue in comparative law.”<sup>32</sup>

In particular, common law and civil law are said to differ in their relevant sources of law and legal methods. In the civil law, the main source of law is statute law, underpinned by academic writings. The main pieces of legislation are “codes,” which provide a logical, systematic, and coherent set of rules to be applied by judges in a deductive and legalistic way. The common law, by contrast, is at its core case law: the judiciary reason inductively from case to case, paying close attention to the facts and remaining constantly aware that such reasoning is not strictly logical but is also based on common sense.<sup>33</sup> Thus, in the common law, not only do the judiciary aim to solve individual disputes, but their decisions are a means of developing the law “from below,” with previous judgments acting as precedents, some of which will be binding in future cases; hence, the common law is sometimes said to have an advantage in terms of adaptability.<sup>34</sup> Common law judges are also said to be

---

de-Silanes, Cristian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. POLIT. ECON. 445 (2004); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. FIN. 1 (2006); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285 (2008) [hereinafter La Porta, Lopez-de-Silanes & Shleifer, *Economic Consequences*]; Djankov et al., *supra* note 8.

<sup>31</sup> Vernon V. Palmer, *Mixed Jurisdictions*, in ELGAR ENCYCLOPAEDIA OF COMPARATIVE LAW 591 (Jan M. Smits ed., 2d ed. 2012).

<sup>32</sup> UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 70 (1997).

<sup>33</sup> For an overview, see JAN M. SMITS, *THE MAKING OF EUROPEAN PRIVATE LAW: TOWARDS A IUS COMMUNE EUROPAEUM AS A MIXED LEGAL SYSTEM* 73–94 (2002). For details, see the contributions in 77 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 300–87 (2013) (based on a symposium entitled *The Dialogue Between Legal Scholarship and the Courts*).

<sup>34</sup> Thorsten Beck, Asli Demirguc-Kunt & Ross Levine, *Law and Finance: Why Does Legal Origin Matter?*, 31 J. COMP. ECON. 653 (2003).

more prepared to display judicial creativity and are praised for being “market-wise,” for instance, in guaranteeing “freedom of contract.”<sup>35</sup>

Meanwhile, judges in civil law countries are said to reason very differently. They have discretion in interpreting statutory law, but once this is completed, they are mere “law-apppliers” expected to follow a strict legal syllogism: first, they identify the legal rule and how it should be interpreted; second, they subsume the facts within these legal rules; and, third, they apply the consequences of the legal rules.<sup>36</sup> Since court decisions are only binding between the parties to the dispute (“*inter partes*”), case law is typically not regarded as a source of law. Moreover, this difference between judges in common and civil law countries can be related to differences in appointment and status: while in the former countries, it is typically experienced lawyers who are appointed or elected as judges, the latter countries usually have a career judiciary with an arguably less distinguished social status.<sup>37</sup>

It is also often said that the role of legal scholarship reinforces the extent of the civil law and common law divide. The civil law tradition is associated with the concept of “learned law,” which is a stronger trend in Germany than France, but not entirely irrelevant in the latter jurisdiction. In particular, law professors have had a strong influence on the character of German law, in contrast to the importance of the judiciary in England and the legislature in France.<sup>38</sup> For example, legal scholars perform a key role in the statutory interpretation of legislation, with this approach particularly evident in Germany. They produce detailed multi-volume annotated guides on the main codes, and monographs, textbooks, and journals also deal extensively with the interpretation of statutory law. Often, then, what

---

<sup>35</sup> Benito Arruñada & Veneta Andonova, *Common Law and Civil Law as Pro-Market Adaptations*, 26 WASH. U. J.L. & POL’Y 81 (2008).

<sup>36</sup> JAMES R. MAXEINER, GYOOHO LEE, ARMIN WEBER & HARRIET WEBER, PRACTICAL GLOBAL CIVIL PROCEDURE: UNITED STATES–GERMANY–KOREA 33, 241 (2010).

<sup>37</sup> For details (as well as criticism of this apparent divide), see MATHIAS SIEMS, COMPARATIVE LAW 41–71 (2014).

<sup>38</sup> RAOUL C. VAN CAENEGEM, LEGISLATORS, JUDGES, PROFESSORS 67 (1987). See also RAOUL C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE 44–45 (2002).

emerges is a predominant view (*herrschende Lehre* in Germany, *la doctrine* in France) which is treated as being as authoritative as the positive law itself.<sup>39</sup>

By marrying the “legal families” approach with comparative corporate law, a particular variant of the former—referred to as the “legal origins” theorem in shorthand—has gained a considerable degree of currency, occupying vital territory in the field of comparative law. The principal contention advanced by the “legal origins” theorem was propounded in a series of articles penned by Rafael La Porta and colleagues. The study conducted by La Porta et al. used a quantitative methodology in order to examine the differences in shareholder protection in forty-nine countries and its impact on financial development. For the purposes of measuring the law, eight variables were used as proxies for shareholder protection: “one share one vote,” “proxy by mail allowed,” “shares not blocked before the meeting,” “cumulative voting,” “oppressed minorities mechanism,” “pre-emptive rights to new issues,” “share capital required to call an extraordinary shareholder meeting,” and “mandatory dividend.” For each variable, every country in the study was coded as “1” where shareholder protection was present, and as “0” where it was not.<sup>40</sup> La Porta et al. found that corporate law regimes grounded in the tradition of the common law were more protective of shareholders than civilian systems:

Compared to French civil law, common law is associated with (a) better investor protection, which in turn is associated with improved financial development, better access to finance, and higher ownership dispersion, (b) lighter government ownership and regulation, which are in turn associated with less corruption, better functioning labor markets, and smaller unofficial economies, and (c) less formalized and more independent judicial systems, which are in

---

<sup>39</sup> See UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER’S COMPARATIVE LAW* 442 (7th ed. 2009).

<sup>40</sup> Other studies have applied this approach to measuring law to many other areas of law, and have mostly confirmed the supremacy of common law countries: see summary in Mathias Siems & Simon Deakin, *Comparative Law and Finance: Past, Present and Future Research*, 166 J. INST. THEORETICAL ECON. 120 (2010).

turn associated with more secure property rights and better contract enforcement.<sup>41</sup>

The argument posits that the direct correlation between regimes which protect shareholders and the sophistication of the state of the capital markets and financial development of a jurisdiction means that civil law countries suffer from a weaker level of stock market development. This has developed into a highly influential body of academic literature,<sup>42</sup> particularly via the *Doing Business* reports of the World Bank.<sup>43</sup> The ascendancy of the common law position is said to be attributable to a low level of government ownership and regulation of corporations, less formalized judicial procedures, and the emphasis it attaches to the reasoned and incremental development of corporate law through a highly independent judiciary.<sup>44</sup> Common law regimes are cast as pursuing a market-based approach, where the shareholder's individual interests are to the fore. Moreover, in these countries, capital markets are seen as more developed, so that interest in shares is broader and shareholder ownership is often dispersed.<sup>45</sup> In civil law countries, by contrast, concentrated ownership structures mostly prevail in publicly traded companies.<sup>46</sup> Since management cooperates with the dominant shareholders, relations within the company are more important than control through the markets. This "insider model" is to be explained by the fact that banks and employees hold a strong position. The firm is accordingly run not primarily in the interests of shareholders, but in the interests of all stakeholders in the undertaking. In these countries too, state influence has a large part to play, so that political views are brought to bear inside the companies.

Further distinctions are frequently made. For instance, since the category of non-Anglo-Saxon countries is very broad, it is suggested that one must distinguish between a German, Latin (in the sense of the Romance language countries, i.e. Italy, France and Spain), and Japanese (or Asian) model of corporate governance. In this vein, for example, it

---

<sup>41</sup> La Porta, Lopez-de-Silanes & Shleifer, *Economic Consequences*, *supra* note 30, at 298.

<sup>42</sup> See Boris Durisin & Fulvio Puzone, *Maturation of Corporate Governance Research, 1993–2007: An Assessment*, 17 CORP. GOVERNANCE 266 (2009).

<sup>43</sup> See WORLD BANK: DOING BUSINESS, [www.doingbusiness.org](http://www.doingbusiness.org).

<sup>44</sup> La Porta, Lopez-de-Silanes & Shleifer, *Economic Consequences*, *supra* note 30, at 286.

<sup>45</sup> Hopt, *supra* note 24, at 9.

<sup>46</sup> See *supra* note 26.



may be said that only the German model tends to present a mandatory division between the management and supervisory board, that the Latin and Japanese models are more network-oriented than the German model, and that stock markets are more important in the German and Japanese models than in the Latin model.<sup>47</sup> Another distinction is between the corporate law and corporate governance systems of developed, developing, and transition economies. In particular, the transition economies of Eastern Europe and Asia have received close attention since in the 1990s, they were viewed as an interesting test case on the switch from socialism to a system of privately owned companies.<sup>48</sup>

The “legal origins” theorem has generated a great deal of controversy. The critiques vary from concerns about the failure of the theory to consider the political determinants of corporate law and corporate governance systems to the adequacy of the methodological approach adopted by La Porta et al. and the assumptions that underpin the conclusions drawn from the empirical results.<sup>49</sup> For example, on the political front, Mark Roe refers to the tendency of governments of a “left-wing” social democratic hue to favor the interests of labor over capital; in such systems, the government eschews corporate laws protecting shareholders as a class in order to prioritize the demands of labor, which leads to greater conflicts between the interests of shareholders and directors/managers. The resulting greater oppor-

---

<sup>47</sup> James Keenan & Maria Aggestam, *Corporate Governance and Intellectual Capital: Some Conceptualisations*, 9 CORP. GOVERNANCE 259 (2001). *But see also* the literature cited *supra* note 5 (on further similarities and variations between board models).

<sup>48</sup> See, e.g., Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000).

<sup>49</sup> Some of the critical literature is as follows: Mark J. Roe, *Corporate Law’s Limits*, 31 J. LEGAL STUD. 233 (2002); Mark J. Roe, *Legal Origins, Politics and Modern Stock Markets*, 120 HARV. L. REV. 460 (2006); Mathias Siems, *Shareholder Protection Around the World: “Leximetric II”*, 33 DEL. J. CORP. L. 111 (2008); John Armour, Simon Deakin, Prabirjit Sarkar, Mathias Siems & Ajit Singh, *Shareholder Protection and Stock Market Development: An Empirical Test of the Legal Origins Hypothesis*, 6 J. EMPIRICAL LEGAL STUD. 343 (2009); John Armour, Simon Deakin, Priya Lele & Mathias Siems, *How Do Legal Rules Evolve? Evidence from a Cross-country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579 (2009); Ruth V. Aguilera & Cynthia A. Williams, *“Law and Finance”: Inaccurate, Incomplete, and Important*, BYU L. REV. 1413 (2009); John Armour, Simon Deakin, Viviana Mollica & Mathias Siems, *Law and Financial Development: What We are Learning from Time-Series Evidence*, BYU L. REV. 1435 (2009); Kathryn Pistor, *Re-thinking the “Law and Finance” Paradigm*, BYU L. REV. 1647 (2009); John Armour & Priya Lele, *Law, Finance and Politics: The Case of India*, 43 LAW & SOC’Y REV. 491 (2009).

tunities for vertical agency costs are attributable to the policy preferences of those “left-wing” governments with a social democratic tradition.<sup>50</sup>

Turning to the methodological deficiencies, the finding that robust shareholder rights lead to more effective and efficient capital markets and financial development was reached by La Porta et al. on the basis of a limited range of coded variables<sup>51</sup> and “cross-sectional data on the [company] laws of countries in the late 1990s, with no systematic coding of legal change over time.”<sup>52</sup> Studies conducted on the basis of longitudinal time-series coding systems have demonstrated that the evidence for a correlation between legal origins and stock market development is much more tenuous.<sup>53</sup> Moreover, these studies revealed that the level of shareholder protection in civil law regimes has been catching up with common law jurisdictions in recent years.<sup>54</sup> Subsequent research has also identified many coding errors,<sup>55</sup> and when the index is recalibrated to remove them, the correlations found by La Porta et al. simply disappear.<sup>56</sup> A number of additional problems have been found, relating to both the legal and the econometric elements of these studies.<sup>57</sup> It is also not entirely self-evident that similarities and differences between legal systems can be explained by the distinction between countries with English, French, and German legal origin. Since countries of the same legal origin are often neighboring countries with a similar culture, La Porta et al.’s results may simply show that geographic vicinity and a common culture make it likely that the laws of two countries influence each other. In itself, such a conclusion appears entirely unremarkable. Moreover, historical linkages between countries may have become weaker as a consequence of the convergence of legal and economic systems.

---

<sup>50</sup> MARK J. ROE, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE 21-26 (2003).

<sup>51</sup> Priya Lele & Mathias Siems, *Shareholder Protection: A Leximetric Approach*, 7 J. CORP. L. STUD. 17 (2007).

<sup>52</sup> Armour, Deakin, Mollica & Siems, *supra* note 49, at 1437–38.

<sup>53</sup> Armour, Deakin, Sarkar, Siems & Singh, *supra* note 49.

<sup>54</sup> *Id.*

<sup>55</sup> Sophie Cools, *The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DEL. J. CORP. L. 697 (2005); Udo Braendle, *Shareholder Protection in the USA and Germany—“Law and Finance” Revisited*, 7 GERMAN L.J. 257 (2006).

<sup>56</sup> Holger Spamann, *The “Antidirector Rights Index” Revisited*, 23 REV. FIN. STUD. 468 (2010).

<sup>57</sup> See, e.g., CURTIS J. MILHAUPT & KATHARINA PISTOR, LAW & CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD 27–44 (2008); Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1313–16 (2009).

Turning to the criticism of the assumptions underpinning the findings reached by La Porta et al., Katharina Pistor propounds three fallacies which lie at the heart of the “legal origins” theorem. First, there is the “extrapolation fallacy”—the unsubstantiated assertion that common law systems with stronger legal protections for shareholders invariably incentivize smaller investors to save their money in shares, leading to a broader investor base and greater capital market development.<sup>58</sup> Second, Pistor advances the “transmission problem,” which criticizes the supposed unidirectional impact of legal origin on specific legal provisions in regulations, statutes, and case law, and on more efficient economic outcomes.<sup>59</sup> Here, La Porta et al. fail to address the possible feedback between legal origins, specific legal provisions, and stock market development, i.e. reverse causality. Finally, there is the “exogeneity paradox” whereby La Porta et al. assume that a country’s legal origin is exogenous and thus independent of the political, social, economic, and cultural context. Instead, there is evidence which shows that the state of a jurisdiction’s stock market and economic development is dependent on a number of factors, including political and economic events and shocks.<sup>60</sup>

Aware of these criticisms, La Porta et al. subsequently refined their methodological approach, producing an index that encompassed a broader range of themes than the original anti-director rights index. Two papers were published,<sup>61</sup> the first of which examined the ease of private and public enforcement of rules designed to constrain self-dealing, with the private means of enforcement duly divided into ex ante and ex post constraints.<sup>62</sup> The findings pointed to correlations of statistical importance in relation to the state of development of a jurisdiction’s stock market, on the one hand, and the robustness of its public and private enforcement of self-dealing rules on the other. Meanwhile, there were also statistically significant correlations between the extent of concentration of share ownership in a jurisdiction’s public corporations and the degree of ex post private regulation of self-dealing.

---

<sup>58</sup> Pistor, *supra* note 49, at 1648–56.

<sup>59</sup> *Id.* at 1656–59.

<sup>60</sup> *Id.* at 1659–62.

<sup>61</sup> Djankov et al., *supra* note 8; La Porta, Lopez-de-Silanes & Shleifer, *Economic Consequences*, *supra* note 30.

<sup>62</sup> Djankov et al., *supra* note 8.

The second paper<sup>63</sup> sought to address some of the more fundamental critiques of their original empirical investigation. Having recalibrated their empirical tools, the authors nonetheless reaffirmed “the [basic] idea that legal origins—broadly interpreted as highly persistent systems of social control of economic life—have significant consequences for the legal and regulatory framework of the society, as well as for economic outcomes.”<sup>64</sup>

We submit that the case-based approach adopted here has the ability to offer some input into the legal origins paradigm. It compares jurisdictions according to whether they are protective of directors, majority shareholders, minority shareholders, or creditors, as determined through carefully constructed hypothetical cases. Although one cannot go so far as to contend that the findings of such a case-based methodology will operate to reveal the rationales for divergences in shareholder protection across the selected jurisdictions, there is considerable force in the view that it will serve to capture nuances in the level of shareholder protection which the cruder “binary type” methodological approach of La Porta et al. is unable to achieve. Moreover, it has the added attraction of possessing the capacity to expose the differences in the source/form and style of the legal rules that function to confer protection on the various constituencies of directors, shareholders, and directors.<sup>65</sup>

#### ***D. Legal Transplants in Corporate Law***

Finally, we move on to consider the relevance of the case-based methodology deployed in this Article to the “legal transplants” debate in the comparative corporate law literature. This debate is also closely linked to the “convergence versus divergence” and “legal origins” debates. The “legal transplants” theory asserts that it is “socially easy”<sup>66</sup> to lift a rule or system of law from one jurisdiction to another. The theory was developed by Alan Watson in his studies on Roman law. The underlying point made by Watson, which is significant for the case-based project adopted here, is that law is an autonomous phenomenon and can be divorced from the social, cultural, economic, and political background within

---

<sup>63</sup> La Porta, Lopez-de-Silanes & Shleifer, *Economic Consequences*, *supra* note 30.

<sup>64</sup> *Id.* at 326.

<sup>65</sup> *See infra* Part III.C.

<sup>66</sup> ALAN WATSON, *LEGAL TRANSPLANT: AN APPROACH TO COMPARATIVE LAW* 95 (2d ed. 1993).

which it operates. Instead, the legal tradition, rather than those contextual factors, is more important in determining whether the adoption of a particular rule or body of law by one particular legal system from another (a) ought to be pursued in normative terms and (b) will be successful.<sup>67</sup> For that reason, Watson rejects the contention that contextual features ought to be given wider consideration prior to any legal borrowing for fear that the recipient legal system will reject the transplant.

This point is developed further by Roger Cotterrell, who draws a distinction between instrumental law and culturally based law. Unlike family law, which is conditioned by a jurisdiction's social and cultural context, and constitutional and administrative law, which are shaped by its political culture, Cotterrell argues that company and commercial law are relatively culturally neutral in nature, since such laws are inextricably linked to "economic interests rather than national customs or sentiments."<sup>68</sup> For that reason, corporate laws are more easily transplantable than family or succession laws, and there is less scope for them to be rejected when borrowed by a host jurisdiction with a wholly distinct contextual background from that of the home jurisdiction.

However, not all scholars are convinced by Watson's theory. The skeptics can be grouped into two camps, namely the contextualists and the culturalists. First, the contextualists reject the idea that law is an exogenous phenomenon and will be accepted by a host jurisdiction irrespective of its culture and context. For example, Otto Kahn-Freund takes the position that "any attempt to use a pattern of law outside the environment of its original country entails a risk of rejection . . . [and] its use requires a knowledge not only of the foreign law but also of its social and above all political contexts."<sup>69</sup> The difference between the contextualists and the culturalists is a matter of degree, since the latter take the more extreme position that the notion of legal transplants should be rejected outright. The leading proponent of the culturalist argument is Pierre Legrand, who asserts that "[i]n any meaning-

---

<sup>67</sup> *Id.* at 108. See also Alan Watson, *Society's Choice and Legal Change*, 9 HOFSTRA L. REV. 1473 (1980–1981).

<sup>68</sup> Roger Cotterrell, *Is There a Logic of Legal Transplants?*, in ADAPTING LEGAL CULTURES 71, 82 (David Nelken & Johannes Feest eds., 2001)

<sup>69</sup> Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 27 (1974); Lawrence M. Friedman, *Some Comments on Cotterrell and Legal Transplants*, in ADAPTING LEGAL CULTURES, *supra* note 68, at 95.

ful sense of the term, ‘legal transplants’ . . . cannot happen.”<sup>70</sup> Here the argument is that once received, a rule or system of law is no longer comparable to its original incarnation in the home jurisdiction. Instead, the form and style of the rule or system of law is refined and shaped by the local context, environment, and culture to the extent that it no longer makes sense to talk of the subject of study as a “legal transplant.”

The methodology adopted in the study that forms the basis of this Article seeks to test some of these theories, particularly in light of the Japanese experience and the 2004 accession of Poland and Latvia to the EU. It is often said that the latter two jurisdictions, particularly Latvia, share affinities with the German model of corporate law, and that the Japanese system imported a number of corporate law rules from the United States following the Second World War. Therefore, the case-based approach offers scope to make a contribution to the legal transplants debate. It will do so by reflecting on whether the case solutions offer any evidence of the extent to which formal or functional transplants have succeeded.<sup>71</sup>

## II. THE PROJECT, ITS CASES, AND ITS COMPONENTS

### *A. Introduction*

The case-based research project included ten hypothetical cases, each of which contained two components that can be characterized as legal issues for resolution, this generating a total of twenty components. Ten jurisdictions were chosen for review. National reporters were appointed for each of the ten jurisdictions, and each of them provided an analysis as to how each case would be solved in their respective jurisdiction. The solutions to each of the two components per case were then coded jurisdiction by jurisdiction in terms of (1) the form, style, and substance of the legal rules applied, including the similarities and differences between those legal rules, (2) the underlying legal sources, and (3) the actual

---

<sup>70</sup> Pierre Legrand, *What “Legal Transplants”?*, in ADAPTING LEGAL CULTURES, *supra* note 68, at 57. For further discussion, see SIEMS, *supra* note 37, at 191–221.

<sup>71</sup> See, e.g., *infra* Part III.E.

results. The findings drawn in respect of (1), (2), and (3) are presented in Part III, below. In this Part we explain the method of the underlying project, the choice of countries and case studies, and the coding of the twenty components in more detail.

## ***B. The Case-Based Method and Practicalities***

### **1. Approaches to Comparative Law: The Functional Method**

It is a trite observation that a comparative analysis that starts with a particular legal feature (rule, concept, or institution) soon encounters difficulties if one of the legal systems under observation does not have that particular feature. Thus, many comparatists suggest that one should not start with a specific legal topic but with a functional question, such as a particular socio-economic problem. In the words of Ernst Rabel, it means that “rather than comparing fixed data and isolated paragraphs, we compare the solutions produced by one state for a specific factual situation, and then we ask why they were produced and what success they had.”<sup>72</sup> The most striking example of such an approach is the Common Core project adopted by European academics interested in contract, tort, and property law.<sup>73</sup> However, this approach has also had its critics, who have challenged the assumptions of the functionalist method. For example, some commentators regard the assumption that all societies face the same social problems as unacceptable;<sup>74</sup> they argue that human needs are not universal but are conditioned by their environments. Moreover, it is not at all untypical

---

<sup>72</sup> Ernst Rabel, *Sculpting the Agenda of Comparative Law: Ernst Rabel and the Façade of Language* (David J. Gerber trans.), reprinted in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 190, 199 (Annelise Riles ed., 2001). For an interdisciplinary overview of functionalism, see Ralf Michaels, *The Functional Method of Comparative Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 339 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

<sup>73</sup> See COMMON CORE, [www.common-core.org](http://www.common-core.org); see also David J. Gerber, *The Common Core of European Private Law: The Project and its Books*, 52 AM. J. COMP. L. 995, 1001 (2004); OPENING UP EUROPEAN LAW, THE COMMON CORE PROJECT 50-53 (Mauro Bussani & Ugo Mattei eds., 2007); SIEMS, *supra* note 37, at 31–33.

<sup>74</sup> David Nelken, *Comparative Law and Comparative Legal Studies*, in *COMPARATIVE LAW: A HANDBOOK* 3, 22–23 (Esin Öricü & David Nelken eds., 2007); Julie De Coninck, *The Functional Method of Comparative Law: Quo Vadis?*, 74 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 318, 327 (2010); Jaakko Husa, *Farewell to Functionalism or Methodological Tolerance?*, 67 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 419, 438 (2013); H. Patrick Glenn, *Comparing*, in *COMPARATIVE LAW: A HANDBOOK*, *supra*, at 91, 95; Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179, 190 (2002).

that law operates to serve more than one explicit function alone. Meanwhile, others challenge the very idea that law serves particular functions. Legal rules may arise pursuant to a complex process of historical path-dependencies, cultural preconditions, and legal transplants, and such rules also shape the problems of society.

However, we submit that these objections do not discredit functionalism as a whole. In fact, the aspiration is that this case-based project will serve to underscore how the use of hypothetical cases can offer important insights in the field of comparative corporate law. It may also be seen as providing evidence that practical problems in corporate law are not so diverse across the ten countries selected as to make a case-based comparison worthless.<sup>75</sup>

In the next subsection, we address the practicalities of the case-based project discussed in this Article, in particular the choice of countries and the procedure applied.

## **2. The Choice of Countries—and the Modus Operandi of the Project**

In accordance with one of the objectives of the project identified above, i.e. whether formal harmonization of corporate law in the EU—or further afield—is necessary, desirable, or at all possible, our main focus in this study<sup>76</sup> was on the Member States of the EU. However, owing to constraints of space, it was not possible for us to cover the law of all twenty-eight Member States. Therefore, our focus was fixed on the most populated countries (Germany, France, the United Kingdom, Spain, Italy, and Poland) as well as on two smaller and more recently acceded Member States (Finland and Latvia). In addition, we included the laws of two of the largest economies of the world, the United States and Japan; their laws are significant and interesting from a comparative perspective, since the United States is the most important “exporter” of corporate governance theories and ideas, and Japan’s corporate law is comprised of a mixture of different legal traditions, having had a

---

<sup>75</sup> Nevertheless, we do not deny that the case-based approach adopted in this work possesses certain inherent limitations. For example, it is unlikely that such an approach will be useful in evaluating technical issues of corporate law such as the content and design of the rules on the composition of board membership, the drafting of prospectuses, or the transparency of securities markets. The same applies for topics of transnational corporate law, such as the operations of cross-border and transnational corporations, corporate group structures, and cross-border mergers and acquisitions, since a case-based approach is typically focused on the laws of a selected number of countries. For further caveats see *infra* Part III.A.

<sup>76</sup> COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9.



number of legal transplants over time. We should clarify that the law of the U.S. state of Delaware was used as a proxy for the United States as a whole. This is attributable to the fact that Delaware corporate law is the most important and influential in the United States, with a significant number of public and private companies incorporated in that state.<sup>77</sup>

Our coordination of the project entailed the appointment of one or two national reporters for each of the ten jurisdictions under examination. We also selected the topics of each of the ten hypothetical cases, with the issues to be addressed in each case loosely configured around the issues of directors' duties, creditor protection, shareholder duties/liabilities, and the flexibility of corporate law and its enforcement.<sup>78</sup> Each of the national reporters performed three tasks. First, he or she drafted one hypothetical case and a solution to that case according to the corporate law of his or her home jurisdiction. The decision to enable each participant to draft one of the cases was predicated on the perceived need to achieve a good mix and balance of cases, possibly reflecting different socioeconomic circumstances. Secondly, the national reporters then circulated their hypothetical cases and solutions amongst the other national reporters, who produced solutions to the other nine cases under the law of their home jurisdictions. Thirdly, each national reporter examined the different solutions to his or her hypothetical case and drew up a comparative conclusion.

In examining the solutions to the ten cases provided by the national reporters, certain problems had to be overcome. For example, the solutions received from the contributors often differed considerably in terms of structure and style. However, a template on how the solutions should be written and structured was deliberately not provided. Comparative lawyers often emphasize that it is differences in legal style, not substantive rules, which are decisive for the common/civil law divide.<sup>79</sup> Thus, to some extent, this project had the secondary aim of exposing these differences in legal thinking and writing. However, this point should not be stretched too far. For example, if a particular national solution contained

---

<sup>77</sup> Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553 (2002); Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885 (1990).

<sup>78</sup> See *infra* Part II.C.

<sup>79</sup> See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 63–73 (3d ed. 1998).

many references to academic literature, this may be an indicator of the civil law tradition,<sup>80</sup> but it could also be influenced by the individual style adopted by the national reporter in question.

### *C. The Ten Hypothetical Cases*

The ten cases were selected in order to cover topics of directors' duties and liabilities (cases one to four); creditor protection, including the relationship between creditors and the company (cases five to six); and the law relating to shares, shareholders, shareholder protection, and the flexibility of corporate law (cases seven to ten). The ten hypothetical cases devised are available online for review.<sup>81</sup> The adoption of this approach has the potential to reveal the extent to which the legal systems selected favor the interests of directors, majority shareholders, minority shareholders, or creditors. This feeds into the higher-order abstract debates in the wider comparative corporate law literature on the relevance of legal origins, "convergence versus divergence," and legal transplants, discussed in Part I. Furthermore, it has the scope to corroborate or refute the argument that agency costs in common law jurisdictions are oriented towards the minimization of vertical agency costs, and that legally constructed constraints of horizontal agency costs represent the focus of civilian systems of corporate law.

We also took the view that the cases ought to address different types of companies. Thus, the aim was to have a good mix of scenarios dealing with smaller, medium-sized, and more substantial companies. Four of the cases asked for a solution based on the applicable law of private limited liability companies. Meanwhile, the remaining six cases concerned public companies (i.e. joint-stock companies), some of which had their shares admitted to a

---

<sup>80</sup> See also *infra* Part III.B.

<sup>81</sup> See David Cabrelli & Mathias M. Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis—Online Supplement*, available at <http://ssrn.com/abstract=2417610>. They can also be found in Mathias Siems & David Cabrelli, *Form, Style and Substance in Comparative Company Law*, in *COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH*, *supra* note 9, at 363.

stock exchange/regulated market.<sup>82</sup> The cases are set out in greater detail in the following three subsections.

## **1. Directors' Duties and Liability**

The first four cases address the position of the ten jurisdictions in respect of directors' duties and liabilities. The focus of the first case was twofold. First, it sought to understand the source, nature, content, and scope of a director's duties of loyalty and care. Secondly, Case 1 evaluated the ability of the shareholders in a general meeting to *ex ante* authorize or *ex post* ratify a breach of a director's duty. Meanwhile, Case 2 investigated the parameters of the legal obligations of nominee directors and the status of promissory notes that are convertible into equity. The third case addressed the nature of the duties of directors in a particular context where managerial loyalties may be conflicted, namely that of a takeover bid. It also sought to identify where the line is drawn between the powers of the directors and the shareholders to take a particular form of defensive action in the case of a takeover bid. The fourth case likewise takes a takeover situation as its focus. However, unlike the third case, the principal concern of Case 4 was to identify the jurisdictions that apply pre-emption rights on the allotment and issue of shares by a company. In other words, the question was to what extent a company must first offer a fresh issue of shares to the existing shareholders before it is entitled to issue shares to non-shareholder third parties.

## **2. Creditor Protection**

Two cases dealt with questions of creditor protection. The fifth case, which relates to the law of creditor protection, assesses the ability of a creditor of a bankrupt company to seek recourse against the shareholders or directors of that company. The first issue is whether a doctrine such as "piercing the veil of incorporation" or some other similar doctrine would permit the creditor to look behind the façade of the separate legal personality of the company to enable it to enforce against the bankrupt company's directors or shareholders. Secondly, we asked national reporters to consider the potential for direct creditor re-

---

<sup>82</sup> See also *infra* Part III.C.

course against the directors of the bankrupt company via the medium of directors' duties. In the sixth case, the focus shifted to the operation of the capital maintenance principle found in the domestic corporate law systems of many European jurisdictions as well as in EU company law.<sup>83</sup> It also addressed the degree to which the corporate laws of the jurisdictions concerned prohibits or constrains the capacity of companies to effect "disguised distributions" of assets to the detriment of creditors, e.g. by transferring assets to a third party or particular shareholder(s) at undervalue or by acquiring assets from a third party or particular shareholder(s) in excess of their market value.

### **3. Shareholders' Rights and Protections and the Flexibility of Corporate Law**

The remaining four cases concentrated on the general rights and protections of shareholders and the flexibility of corporate law. Case 7 sought to establish whether shareholders have an entitlement to challenge the decisions of majority shareholders where the latter have failed consistently to vote in favor of the distribution of an annual dividend over a period of time. The second matter addressed by this case was whether the vote of an interested shareholder in favor of merging the company with another company is somehow tainted and can be ignored on the grounds that it is null and void. Meanwhile, the eighth case looked to understand the circumstances in which shareholders have a right to ask questions of management at a general meeting. It also analyzed the legal effect of a purported breach of shareholder rights and whether this operates to invalidate any resolutions passed at a general meeting. Case 9 highlighted the legal processes recognized in the various jurisdictions that enable shareholders to enforce their rights. One of the key issues addressed was whether it is possible for an aggrieved minority shareholder to challenge a breach of directors' duties or the actions of a controlling shareholder through the medium of a derivative action, including the qualifying conditions imposed on such litigation. Secondly, the

---

<sup>83</sup> Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on Coordination of Safeguards which, for the Protection of the Interests of Members and Others, Are Required by Member States of Companies Within the Meaning of the Second Paragraph of Article 54 of the Treaty on the Functioning of the European Union, in Respect of the Formation of Public Limited Liability Companies and the Maintenance and Alteration of Their Capital, With a View to Making Such Safeguards Equivalent Text with EEA Relevance, 2012 O.J. (L 315) 74. (Previously, this was Directive 77/91/EEC of 13 December 1976, 1976 O.J. (L 26) 1.)

flexibility of the corporate law regimes of the ten jurisdictions was also analyzed. National reporters were asked to consider whether it is possible for a decision to be taken informally by the shareholders with unanimous consent where corporate law rules or the terms of the company's constitution specifically require a formal vote to be taken at a properly convened general meeting of the shareholders. Finally, the purpose of the tenth case was to consider whether any legal constraints are placed on the ability of shareholders to restrict the free transfer of shares in the company's constitution, e.g. through the application of pre-emption rights on the transfer of shares in favor of existing shareholders, and whether a company is able to restrict a third party from inheriting shares upon the death of a shareholder.

#### ***D. The Coding of the Twenty Components***

The ten case studies involved in the research deal with a variety of legal topics. Thus, we abstracted two components for each case and coded those for each country. Then, we addressed the resulting twenty components at three levels, namely (1) the similarities and differences in terms of the legal rules, (2) the underlying legal sources, and (3) the actual results. The full codings are available online.<sup>84</sup> Table 1 illustrates how one of the two components of Case 6 on creditor protection was coded.

---

<sup>84</sup>See *supra* note 81.

TABLE 1. CODING EXAMPLE FOR “VEIL PIERCING” (CASE 6, FIRST COMPONENT)<sup>85</sup>

	<i>FRA</i>	<i>GER</i>	<i>ITA</i>	<i>SPA</i>	<i>FIN</i>	<i>POL</i>	<i>LAT</i>	<i>UK</i>	<i>US</i>	<i>JP</i>
Legal rules	A	B	B	B	B	C	C	B	B	B
	Explanation: concept of fictitious company (A); concept of piercing the corporate veil (B); no such concepts (C)									
Sources of law	C	C	L,A	C	C,A	N	N	C	C	C
	Explanation: legislation (L); courts (C); academics (A) (if cited as a quasi-source of law, instead of a further reference); (N) problem unknown (i.e. no law).									
Results	C	S	S	S	S	S	S	S	S	S
	Explanation: result favoring shareholders (S); creditors (C).									

With respect to the category “legal rules,” the coding was influenced by two conflicting considerations. On the one hand, for the purposes of the subsequent analysis, it would have been pointless to consider each of the ten legal systems as unique. On the other hand, it would have been equally uninteresting to say that at their core, all legal systems tend to be similar. Thus, we coded the twenty components with the aim of identifying between two and four groups of countries, such as three (A, B, C) in Table 1.

The coding of “sources of law” was understood in a functional way. For instance, case law and academic writings have been included notwithstanding that they are not regarded as a source of law in a technical sense in all jurisdictions. In addition to the categories shown in Table 1, in some of the twenty components the legal responses were based on

<sup>85</sup> In this table, as well as the following ones, the countries are abbreviated as FRA (France), GER (Germany), ITA (Italy), SPA (Spain), FIN (Finland), POL (Poland), LAT (Latvia), UK (United Kingdom), US (United States), and JP (Japan).

self-regulation (such as corporate governance codes) or left to the discretion of the company (e.g., its articles of association).

The final category codes the results of the twenty components. In the example of Table 1, there were only two options, namely that this particular component of the case protects the interests of either the shareholders or the creditors. In some of the other cases we also coded the conflict between the interests of shareholders and directors, on the one hand, and minority and majority shareholders, on the other.<sup>86</sup> In some instances, we also had to code a country as not providing a clear answer to the component in question.

### III. MAIN COMPARATIVE FINDINGS

#### *A. Introduction*

Based on the coding explained in the previous Part, this Part entails an evaluation of the nature and content of the respective legal rules of corporate law, the sources of those rules, and the results reached on the application of such rules. This approach enables quantification of similarities and differences, going beyond anecdotal examples. Since any quantitative information needs to be interpreted, paradigmatic cases are also referred to where necessary.

The following caveats need to be made. First, such data are sensitive to the design of the cases. Yet, we hope that the assignment of each national reporter to draft one of the cases achieved a good mix of cases. As the organizers of the project, we coordinated the drafting of the cases so as to strike a balance between cases addressing private and public companies, as well as between cases dealing with the core topics of directors' duties, creditor protection, and shareholders' rights.<sup>87</sup> It may also be noted that the subjective element in the selection of variables is by no means unique to the current study.<sup>88</sup> Secondly, the solutions to each case were drafted by one or sometimes two local lawyers; other lawyers from

---

<sup>86</sup> See also the discussion about agency costs *supra* Part I.B.

<sup>87</sup> See *supra* Parts II.B.2, C.

<sup>88</sup> See *supra* Part I.C (for the discussion of the La Porta et al. studies).

the same jurisdictions may not have provided exactly the same answers. To mitigate against idiosyncrasy in this regard, as the project organizers, we read all solutions and requested further explanations and references, in particular where we found that a solution as submitted by a reporter did not sound entirely plausible. We also asked the national reporters to clarify whether their legal solutions were likely to be shared by other lawyers from their countries, in circumstances where there was a degree of doubt as to that solution.

### ***B. Comparison of Legal Rules***

The coding of the legal rules according to the twenty components offered the opportunity to assess the similarities and differences between the ten countries. For this purpose the coded attributes (*cf.* Table 1) needed to be converted into relations showing the differences between each pair of countries.<sup>89</sup> This is achieved by ascertaining whether each variable in the law of a particular country corresponds to that of any of the other nine countries, whereby each observation of difference was coded as “1”. Subsequently, the absolute values of these differences are added together. For example, the coding in Table 1 shows that France and Germany have different rules that govern the topic of veil piercing (the first component of Case 6). Thus, for this component, the difference between France and Germany is “1.” A corresponding procedure was applied to all twenty components. Adding all of those numbers together led to the result that, for example, in fifteen out of twenty components, France and Germany have different legal rules.

---

<sup>89</sup> On turning attributes into relations, see, e.g., ROBERT HANNEMAN & MARK RIDDLE, INTRODUCTION TO SOCIAL NETWORK METHODS ch. 6 (2005), *available at* <http://faculty.ucr.edu/~hanneman/nettext/>; DAVID KNOKE & SONG YANG, SOCIAL NETWORK ANALYSIS 7 (2d ed. 2008). For its application to law, see also Mathias Siems, *The Web of Creditor and Shareholder Protection: A Comparative Legal Network Analysis*, 27 ARIZ. J. INT’L & COMP. L. 747 (2010).



TABLE 2. MATRIX OF DIFFERENCES IN LEGAL RULES (MAX 20, MIN 0)

	<i>FRA</i>	<i>GER</i>	<i>ITA</i>	<i>SPA</i>	<i>FIN</i>	<i>POL</i>	<i>LAT</i>	<i>UK</i>	<i>US</i>	<i>JP</i>	<i>Mean</i>
FRA		15	9	9	14	12	11	12	13	13	12
GER	15		9	10	11	8	10	13	16	13	11.67
ITA	9	9		8	11	8	10	12	10	12	9.89
SPA	9	10	8		10	8	6	11	10	12	9.33
FIN	14	11	11	10		10	12	11	14	17	12.22
POL	12	8	8	8	10		6	15	14	15	10.67
LAT	11	10	10	6	12	6		13	13	14	10.56
UK	12	13	12	11	11	15	13		11	11	12.11
US	13	16	10	10	14	14	13	11		10	12.33
JP	13	13	12	12	17	15	14	11	10		13

The outcome of this process is the matrix of differences in Table 2. It reveals which countries are most similar to and different from the other nine. The result is that Japan and the United States are the most “eccentric” and Spain and Italy are the most “mainstream” (see the final column). This may reflect the fact that Japan and the United States are the only non-EU countries involved in the case-based study. Though it has sometimes been said that EU harmonization is trivial in corporate law,<sup>90</sup> a number of the case solutions written by the national reporters referred to the EU Directives, for instance, as far as takeovers are concerned, on questions of capital maintenance and the right of shareholders to ask questions

<sup>90</sup> Luca Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?*, 27 U. PA. J. INT’L ECON. L. 1 (2006).

in the general meeting.<sup>91</sup> The “mainstreamness” of Spain and Italy also makes sense since the corporate laws of these countries have been influenced by both the French and the German legal traditions. However, overall, even the most similar countries have different legal rules in more than nine out of twenty components, thus showing that the convergence of corporate laws has not led to identical rules.

It is interesting to see whether certain intuitive expectations about similarities are confirmed or refuted. The most similar pairs in Table 2 are Latvia–Poland and Latvia–Spain, followed by Spain–Italy, Spain–Poland, Germany–Poland, and Italy–Poland. These results may show that European civil law countries are relatively similar, as one would expect. With respect to the United Kingdom and the United States, however, the difference between them is considerable, and at least as high as some of the differences which arise between them and civil law countries. For example, this can be seen in the case studies on takeovers, as well as those on shareholder rights and litigation.<sup>92</sup> Similarly, the literature frequently points towards differences between U.K. and U.S. corporate law, in terms of both the legal rules and the law in action.<sup>93</sup> There is also no evidence of an “Americanization” of continental European countries, since the United States is not particularly close to any of them. Finally, Table 2 shows that Japanese corporate law is closer to that of the United States, as well as to that of the United Kingdom, than it is to the law of any of the civil law countries, thus confirming the Japanese shift towards the U.S. system, at least as far as the positive rules are concerned.<sup>94</sup> For instance, the lack of general pre-emption rights and

---

<sup>91</sup> See COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, chs. 4–6, 9.

<sup>92</sup> See *id.* chs. 4–5, 9–10.

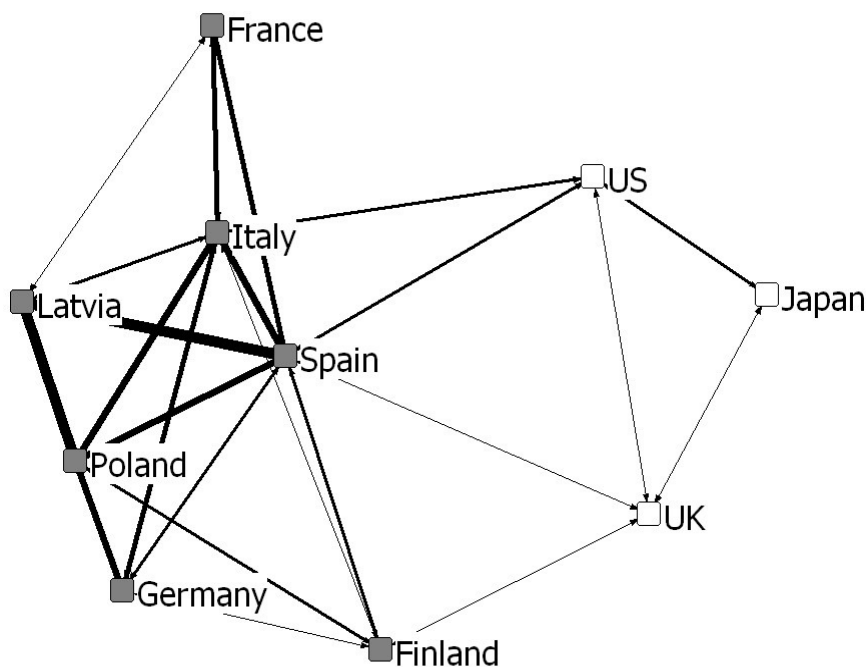
<sup>93</sup> See, e.g., CHRISTOPHER M. BRUNER, CORPORATE GOVERNANCE IN THE COMMON-LAW WORLD: THE POLITICAL FOUNDATIONS OF SHAREHOLDER POWER (2013); MARC T. MOORE, CORPORATE GOVERNANCE IN THE SHADOW OF THE STATE (2013); John Armour, Bernard Black, Brian Cheffins & Richard Nolan, *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. EMPIRICAL LEGAL STUD. 687 (2009); Ruth V. Aguilera, Cynthia A. Williams, John M. Conley & Deborah E. Rupp, *Corporate Governance and Social Responsibility: A Comparative Analysis of the UK and the US*, 14 CORP. GOVERNANCE 147 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950–2000*, 46 BUS. HIST. 267 (2005).

<sup>94</sup> For this shift since the mid-twentieth century, see, e.g., SIEMS, *supra* note 15, at 20–22.

the availability of derivative actions are features of Japanese law that are shared with the United States, and make it different from most continental European countries.<sup>95</sup>

The relative proximity of the jurisdictions to one another can be presented as a network.<sup>96</sup> For this purpose, the information about each of the pairs was entered into a network analysis program (UCINET) enabling us to represent only those “ties” (i.e. relationships between countries) that are below a particular threshold. In Figure 1, the ties with a value of eleven or less (see Table 2) are displayed, and the more similar the country pair the bolder the tie in the figure. In addition, using the technique of multidimensional scaling, the network analysis program has shifted the position of nodes according to the strength of their relationships, so that countries whose laws are relatively similar are moved closer together.

FIGURE 1. NETWORK BASED ON SIMILARITY OF LEGAL RULES (WITH TWO CLUSTERS)



As Figure 1 illustrates, the legal rules in Spain, Latvia, and Poland are very close to one another, and are also relatively proximate to the other continental countries (Germany, Fin-

<sup>95</sup> See COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, chs. 5, 10.

<sup>96</sup> The approach of this article is similar to Siems, *supra* note 89, but different from Siems & Cabrelli, *supra* note 84 (where we displayed “neighbour networks”).

land, Italy, and France). There are two links each between the United States and the United Kingdom with continental European countries, but overall the United Kingdom, the United States, and Japan are relatively distant from all other countries. It can further be seen that the United States and Japan are relatively close.

Network analysis also provides tools to identify community structures.<sup>97</sup> For the purpose of this Article, we calculated “optimization clusters,” a formal method that “[o]ptimizes a cost function which measures the total distance or similarity within classes for a proximity matrix.”<sup>98</sup> The user has to determine how many clusters will be created in advance. The coloring of the nodes in Figure 1 is based on a division into two clusters which shows the aforementioned divide between the seven continental European countries and the three other countries.

We also calculated divisions into more clusters. It is then possible to compare the “fit” of these various divisions, finding that the best fit is achieved if the data are divided into five clusters:<sup>99</sup> (1) the United States and Japan, (2) Germany, Italy, Spain, Poland, and Latvia, and finally (3) Finland, (4) the United Kingdom, and (5) France each set out on their own. This result produces the observation that the French civilian system of corporate law stands apart from the German strand of the civil law, as well as the Spanish, Italian, and Eastern European jurisdictions. It also substantiates the point articulated above that the U.K. common law regime is not as closely aligned to that of the United States as is often assumed. Another notable point is that the identification of the five clusters demonstrates the extent to which the German civil law tradition exerts a degree of pull and influence over the legal systems of Italy and Spain, which are more commonly aligned with the French civilian legal family. This causes us to question whether the traditional distinction between the German and French branches of the civil law has any meaningful field of application in the area of corporate law.

---

<sup>97</sup> See, e.g., KNOKE & YANG, *supra* note 89, at 77–91; HANNEMAN & RIDDLE, *supra* note 89, chs. 11, 13.

<sup>98</sup> Definition taken from ANALYTIC TECHNOLOGIES, <http://www.analytictech.com/ucinet/help/2cvtid.htm>. Note that this does not depend on the cutoff point used for the purposes of Figure 1.

<sup>99</sup> The precise numbers are fit -0.673 and *r*-square 0.453, as compared to fit -0.614 and *r*-square 0.377 for a division into two clusters.

### *C. Comparison of Underlying Sources of Law*

Comparative lawyers often highlight differences in the prevalent sources of law. It is frequently asserted that case law is more important in common law jurisdictions, whereas in civil law countries, the codes and academic writings tend to play a stronger role.<sup>100</sup> In addition, the corporate law and corporate governance literature claims that corporate law rules are frequently mandatory in continental European legal systems, in contrast to Anglo-Saxon firms, which are said to enjoy a greater degree of flexibility.<sup>101</sup> Thus, there may also be differences in the extent to which questions are left to self-regulation and the articles of association/corporate bylaws. But this is not without controversy, as one of us has previously written:

All the same, in the countries studied here [France, Germany, Japan, China, the United States, and the United Kingdom] convergence in shareholder law has come about. This can be seen, first, in the relevant legal bases . . . . [T]here are similar basic patterns, with codifications of company and securities law being supplemented by case law, articles of association, shareholder agreements and corporate governance codes. Moreover, market forces play an important part, without a legal system necessarily on that account giving up statutory control mechanisms.<sup>102</sup>

The evidence from the current case-based project is mixed. For example, two of the case solutions show that civilian systems of corporate law may be more inflexible than their common law counterparts inasmuch as the former are more likely to prohibit or restrict the ability of companies to (i) include provisions in their articles which prevent the heir of a deceased shareholder from inheriting the latter's shares and (ii) issue debt securities convertible into equity.<sup>103</sup> However, this can be contrasted with two other findings, which confirm that both civilian and common law jurisdictions recognize (i) the highly flexible in-

---

<sup>100</sup> See *supra* Part I.C.

<sup>101</sup> *Id.*

<sup>102</sup> SIEMS, *supra* note 15, at 225; see also *id.* at 59.

<sup>103</sup> See COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, chs. 3, 11.

formal unanimous consent rule or a functional equivalent in their corporate laws and (ii) the validity of pre-emption provisions on share transfers in the articles of their companies, with or without restrictions.<sup>104</sup>

More comprehensively, the sources of law determining the results in respect of each of the twenty components have been identified.<sup>105</sup> Table 3 presents the results.

TABLE 3. PREVALENCE OF SOURCES OF LAW (MAX 20, THREE HIGHEST VALUES HIGHLIGHTED)

	<i>FRA</i>	<i>GER</i>	<i>ITA</i>	<i>SPA</i>	<i>FIN</i>	<i>POL</i>	<i>LAT</i>	<i>UK</i>	<i>US</i>	<i>JP</i>
Legislation	17	17	19	17	18	16	17	15	8	18
Case law	11	13	5	3	2	2	1	15	15	10
Academic	1	11	7	9	3	6	2	0	0	2
Self-regulation	0	0	0	1	2	0	0	4	0	0
Discretion	0	0	0	0	0	0	0	0	2	0
None	0	0	1	0	1	3	3	0	2	1

It can be seen that legislation is the most relevant source for at least 75% of the components (i.e. fifteen) in all legal systems except the United States. The difference between the United Kingdom and the United States may be surprising, but it is not wholly implausible. The frequent reforms of U.K. corporate law have expanded the scope and detail of the Companies Act. For example, in the U.K. Companies Act 2006, topics such as directors' duties

<sup>104</sup> See *id.*, chs. 10–11.

<sup>105</sup> See *supra* Part II.D.

have now been partly codified, whereas even in civil law countries such as France and Germany, these are still largely based on case law.<sup>106</sup>

The data also show that case law is not only important in the United Kingdom and the United States but also in Germany, France, and Japan. It plays less of a role, however, in the jurisdictions with a smaller pool of case law, possibly because they have relatively new corporate laws (Poland, Latvia) or because they are relatively small jurisdictions (Finland, Latvia). It is also worth pointing out that to say that case law plays a role in both civil and common law countries does not mean that their actual mode of operation is identical in practice; for instance, there may still be differences in terms of the prevalent judicial approach, such as whether to adopt legal reasoning based on ideas of justice or efficiency.

Academic research plays a significant role in many of the case solutions from Germany, Italy, and Spain, whereas it was not decisive for the United Kingdom and the United States. This could be viewed as confirming the difference between the civil law—in particular its German variant—and common law.<sup>107</sup> As with case law, it may also make sense that academic writing is less important in smaller jurisdictions (Finland, Latvia) than in larger ones.

The final three categories were revealed to be important in only a limited number of countries. However, these remaining differences can be explained. Self-regulation plays a relatively important role in U.K. corporate law, for instance with respect to takeovers.<sup>108</sup> In the United States, there are a few instances where there is simply no law at all or the decision is left to the discretion of the company; this is to be explained by the “light approach” in regulating the internal affairs of companies<sup>109</sup> that has been adopted by Delaware, the corporate seat of almost half of the listed companies in the United States. Finally, Poland and Latvia have only relatively recently promulgated a set of corporate laws. Therefore, it

---

<sup>106</sup> Companies Act, 2006, c. 46, sections 171-178 (U.K.). For an overview, see Bernard Black et al., *Legal Liability of Directors and Company Officials Part 1: Substantive Grounds for Liability*, COLUM. BUS. L. REV. 614 (2007).

<sup>107</sup> See *supra* Part I.C.

<sup>108</sup> See, e.g., Armour & Skeel, *supra* note 6.

<sup>109</sup> Critics call this a “race to the bottom.” See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). Conversely, others emphasize its efficiency. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14 (1993).

is perhaps unsurprising that in a few instances a response was received to the effect that a particular legal problem or solution was not yet known.

Does the preference for a particular source of law vary between private limited companies (such as the “Ltd.” in the United Kingdom and the “GmbH” in Germany) and public companies (i.e. joint-stock companies such as the U.K.’s “plc” and the German “AG”)? The scenarios of the case studies underlying this Article always specified the type of company in question.<sup>110</sup> Yet, it must also be considered that the form a company takes does not always correspond to the way it operates in practice. For example, on the surface, the French SARL resembles the German GmbH, and the French SA the German AG, but in France, even small to medium-sized firms and family firms often use the SA form. In addition, French law offers a third legal form, the SAS, which was created to cover the area between the SA and the SARL.<sup>111</sup> The implication of these factors for the project was that while guidance was provided to national reporters on the type of company that was expected to be covered in each of the individual case studies, some contributors indicated possible alternative solutions for different types of companies. On occasion, national reporters also mentioned that a particular aim could not be pursued by adopting the form of company prescribed in the scenario in question, but that another form of company would have to be used or would be available.

---

<sup>110</sup> COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, chs. 2–3, 7, 10 deal with private companies, and chs. 4–7, 9, 11 with public companies.

<sup>111</sup> A somewhat analogous situation exists in the United States. Here, a primary distinction is made between closely and publicly held corporations, but businesses can also establish a limited liability company (LLC). The success of state LLC laws is particularly based on the fact that while LLCs have the legal form of a company, for tax purposes they are treated as a partnership. In 2005, Japan also introduced the LLC based on the U.S. model, but without the advantage of being taxed as partnerships. By contrast, U.K. law provides for a Limited Liability Partnership (LLP) which, like U.S. LLCs, is structured similarly to a company but is taxed as a partnership.



TABLE 4. PREVALENCE OF SOURCES OF LAW

	<i>Total</i>	<i>Cases on Ltds</i>	<i>Cases on plcs</i>
Legislation	81.00%	85.00%	78.33%
Case law	38.50%	36.25%	40.00%
Academic	20.50%	26.25%	16.67%
Self-regulation	3.50%	0.00%	5.83%
Discretion	1.00%	1.25%	0.83%
None	5.50%	3.75%	6.67%

Notwithstanding this caveat, it is possible to calculate the prevalence of the sources of law for Ltds and plcs. Table 4, above, shows that there are only small differences. To be sure, this is also a reflection of the scope of our project—its main focus was on topics of corporate law. If one were to consider rules specifically applicable to companies admitted to a stock exchange, listing rules and other forms of secondary regulation would play a decisive role for public companies.

As in the previous section, the data can be transformed into a dataset showing the differences between countries. The matrix of differences, analogous to Table 2, is available in the online supplement.<sup>112</sup> Hence, it is once again possible to produce a network picture, depicting the similarities and differences in terms of the sources of law.

---

<sup>112</sup> See Cabrelli & Siems, *supra* note 81.

FIGURE 2: NETWORK BASED ON SIMILARITY OF SOURCES OF LAW (WITH TWO CLUSTERS)

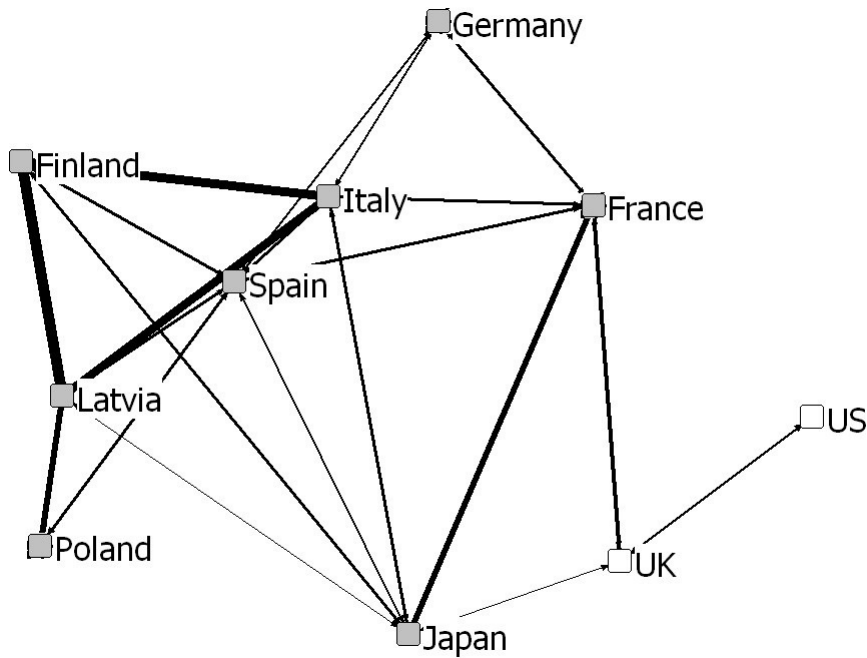


Figure 2 can be explained as follows (also drawing on the information from Table 3): Latvia, Finland, and Italy are fairly close since legislation is by far the most important source of law. Poland and Spain are also similar to those countries, but here the academic literature also plays a role. Thereafter, Germany, France, and Japan share some affinities with the aforementioned jurisdictions, but case law is more influential in this regard. In France, the academic literature plays less of a role than in the other civil law countries. The United Kingdom is similar to France, but with a prominent role performed by self-regulation. Finally, the United States is very different from the other countries since it relies much less on legislation in corporate law than do the other nine countries.

Figure 2 also shows the coloring of the nodes according to two clusters. Here, such a division of the dataset provides the best “fit.”<sup>113</sup> It reflects a clear distinction between common and civil law countries, since the United Kingdom and the United States belong to one cluster, and the remaining eight countries to the other one. But, as the discussion of this

<sup>113</sup> The precise numbers are fit -0.641 and *r*-square 0.411.

section has shown, this does not mean that there is not also a great deal of variation within these clusters.

#### ***D. Comparison of Results***

As explained above,<sup>114</sup> the ten cases of this book have been selected in order to cover topics of directors' duties and liabilities, creditor protection, including the relationship between creditors and the company, and the law relating to shares, shareholders, shareholder protection, and the flexibility of corporate law. Thus, it was possible to examine whether legal systems tend to favor the interests of directors, shareholders, or creditors. In addition, it should be stressed that in companies with a dominant shareholder, the main conflict is often between minority and majority/controlling shareholders. The findings from this case-based research harbored the potential to answer the question whether: (1) civilian systems are indeed characterized by "insider/control-oriented" horizontal agency problems that are addressed by policies in corporate law preferring the interests of minority shareholders, and (2) common law regimes prioritize the promulgation of rules in corporate law that seek to minimize vertical agency costs. All of this was reflected in the coding of the results for the twenty components.<sup>115</sup> Table 5 aggregates those results and indicates the maximum that can be achieved in each of the categories, given that not all potential interests are addressed in each of those components.<sup>116</sup>

---

<sup>114</sup> See *supra* Part II.C.

<sup>115</sup> See *supra* Part II.D.

<sup>116</sup> For the precise codings of each of the twenty components, see Cabrelli & Siems, *supra* note 81.

TABLE 5: PREFERENCE FOR INTERESTS OF DIRECTORS, SHAREHOLDERS AND CREDITORS  
(HIGHEST VALUES HIGHLIGHTED <sup>117</sup>)

	<i>FRA</i>	<i>GER</i>	<i>ITA</i>	<i>SPA</i>	<i>FIN</i>	<i>POL</i>	<i>LAT</i>	<i>UK</i>	<i>US</i>	<i>JP</i>
Directors (max. 11)	6	5	6	6	4	3	6	6	9	4
Shareholders (max. 11)	4	4	5	3	6	4	3	5	3	4
Creditors (max. 3)	2	2	1	2	1	2	2	1	1	2
Majority shareholders (max. 8)	3	2	1	2	2	3	3	7	4	6
Minority shareholders (max. 8)	4	5	4	2	4	4	4	1	0	1
Unclear (max. 20)	1	2	3	5	3	4	2	0	3	3

In the context of the position of directors, Table 5 points towards U.S. exceptionalism since the US tends to favor directors more often than the other countries. This is in line with other studies that stress the predominance of the “director primacy” model in the U.S. corporate law system,<sup>118</sup> while disaffirming the view expressed by Hansmann and Kraakman that

<sup>117</sup> In general, the highest two values were highlighted. However, the second highest value was not highlighted if this had meant that half or more of the countries would have been highlighted.

<sup>118</sup> See Lele & Siems, *supra* note 51. Note that this specifically refers to U.S. corporate law, while in securities and financial markets law, the United States may be more effective in the protection of investors, for example through advanced disclosure requirements and a well-funded securities regulator. For a similar point, see

modern U.S. corporate law leads the way in having adopted a shareholder-oriented model.<sup>119</sup> Some scholars have argued that the director primacy approach of U.S. corporate law has worked very well,<sup>120</sup> though others have suggested that existing rights must be made more effective and that the power of shareholders to modify the company's charter ought to be improved.<sup>121</sup>

A possible complication concerns the private enforcement of rights, for instance through derivative actions. Here, it may be argued that the U.S. position is favorable towards shareholders since the combination of contingency fees and the “American cost rule” creates good incentives to enforce breaches of directors’ duties—in contrast to the situation in other countries.<sup>122</sup> Some of our case studies do also show that U.S. law is an effective system for the private enforcement of directors’ duties by shareholders. For example, along with France and Japan, in the United States, if a “demand requirement” is made that the company raise legal proceedings against the miscreant directors and the company fails to do so, a shareholder then has the right to raise a derivative action on behalf of the company against those directors. This can be contrasted with the more stringent preconditions applied in the context of a derivative action in Spain and Finland, where a shareholder must hold a minimum of five and ten per cent of the shares of the company respectively; it is likewise more stringent in the United Kingdom, where the courts apply statutory pre-hearing criteria in a manner which is generally hostile to the continuation of derivative litigation.<sup>123</sup>

---

Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009).

<sup>119</sup> See *supra* Part I.B.

<sup>120</sup> See, e.g., STEPHEN M. BAINBRIDGE, *CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS* 233–55 (2012); Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006).

<sup>121</sup> Lucian A. Bebchuk, *The Myth that Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013); Julian Velasco, *Taking Shareholder Rights Seriously*, 41 UC DAVIS L. REV. 605 (2007); Lucian A. Bebchuk, *Letting Shareholders Set the Rules*, 119 HARV. L. REV. 1784 (2006).

<sup>122</sup> See Mathias Siems, *Private Enforcement of Directors’ Duties: Derivative Actions as a Global Phenomenon*, in *COLLECTIVE ACTIONS: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?* 93 (Stefan Wrba, Steven Van Uytsel & Mathias Siems eds., 2012).

<sup>123</sup> For further details, see *COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH*, *supra* note 9, ch. 10.

But it is also plausible to address the protection of shareholders at an aggregate level. The empirical literature on corporate law frequently uses such aggregates.<sup>124</sup> There has also been recent theoretical support for the use of aggregates and other composite indicators. This is based on a “bundle perspective to comparative corporate governance” since a particular mechanism often depends on, or may be substituted, by other questions of corporate governance.<sup>125</sup> Thus, despite its limitations, there is some justification to interpret the levels of protection at the aggregate level, as displayed in Table 5.

Here, the relatively low level of shareholder protection in U.S. law raises doubts about the legal origins “story,” namely the argument that the comparatively robust shareholder protection of common law countries has led to more dispersed shareholder ownership and more developed capital markets.<sup>126</sup> Additional evidence against the validity of the legal origins theorem is furnished by the observations drawn from four of our case studies insofar as they establish that (i) there are no major substantive differences in the degree to which shareholders are protected by the directors’ duty of care, skill, and loyalty; (ii) no major deviation between the United Kingdom (as a common law country) and the civilian jurisdictions is detectable in relation to the degree to which shareholders benefit from the right to ask questions, challenge a shareholders’ resolution, and/or block a merger owing to the occurrence of a procedural defect in the conduct of a general meeting; and (iii) each of the jurisdictions examined has mechanisms which enable minority shareholders to enforce a breach of directors’ duties, ranging from a mixture of derivative actions, personal actions, and the hybrid *actio pro socio*.<sup>127</sup>

In Table 5, the United Kingdom performs well in the general category of shareholder protection; nevertheless, it shares commonalities with the United States (as well as

---

<sup>124</sup> See, e.g., the La Porta et al. and Armour et al. studies, *supra* notes 8, 30, 49.

<sup>125</sup> Gerhard Schnyder, *Measuring Corporate Governance: Lessons From the ‘Bundles Approach’*, Centre for Business Research, University of Cambridge, Working Paper No. 438 (2012), available at <http://www.cbr.cam.ac.uk/pdf/WPfourthreeeight.pdf>, following Ruth V. Aguilera, Kurt A. Desender & Luiz Ricardo Kabbach de Castro, *A Bundle Perspective to Comparative Corporate Governance*, in THE SAGE HANDBOOK OF CORPORATE GOVERNANCE 380 (Thomas Clarke ed., 2012).

<sup>126</sup> See *supra* Part I.C.

<sup>127</sup> For further details, see COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, chs. 2, 4, 9–10.

Japan) insofar as the U.K. courts are generally more hostile to legal proceedings raised by the minority against the majority than are the courts of the continental European countries. For example, unlike the United Kingdom, our findings appear to indicate that civilian jurisdictions such as Spain, Poland, Germany, Latvia, and Italy are receptive to minority shareholder claims against the majority and, indeed, in certain civilian jurisdictions, the law imposes fiduciary duties on the controlling or majority shareholders which are owed to the minority.<sup>128</sup> This can be explained by the relatively concentrated ownership structures of continental European companies, leading to the risk that the dominant shareholder exploits the minority. In the United Kingdom and the United States, shareholder ownership is more dispersed and therefore there may be less need to interfere with the principle of majority rule. Hence, there is indeed some evidence for the proposition that certain civil law systems appear to prioritize the eradication or minimization of horizontal agency costs more than common law jurisdictions by placing greater emphasis on duties owed by controlling shareholders to minority shareholders.<sup>129</sup> However, this does not translate into a greater variety or number of enforcement mechanisms than common law jurisdictions, since all of the jurisdictions surveyed contain means by which minority shareholders can seek redress against wrongdoing directors.<sup>130</sup>

The remaining two categories of Table 5 have to be interpreted cautiously. Creditor protection seems to be stronger in most civil law countries than in the United Kingdom and the United States, which may reflect that in the former countries, bank finance is more important than market finance. Indeed, the findings from our case on “veil piercing” and related topics suggest that French and Japanese law are the most pro-creditor and the United States the least.<sup>131</sup> However, since this category is based only on three variables, the results should not be overinterpreted, and it should also be stressed that the second case study on creditor protection revealed that creditors in all of the jurisdictions are protected by a di-

---

<sup>128</sup> For example, Germany, Poland, and Latvia. Although the United Kingdom does not recognize the notion that majority or controlling shareholders owe fiduciary duties to the minority shareholders, the “unfair prejudice” remedy and the statutory derivative claim (respectively, sections 994 and 260–69 of the Companies Act, 2006, c. 46) operate as functional equivalents.

<sup>129</sup> See also *supra* Part I.B.

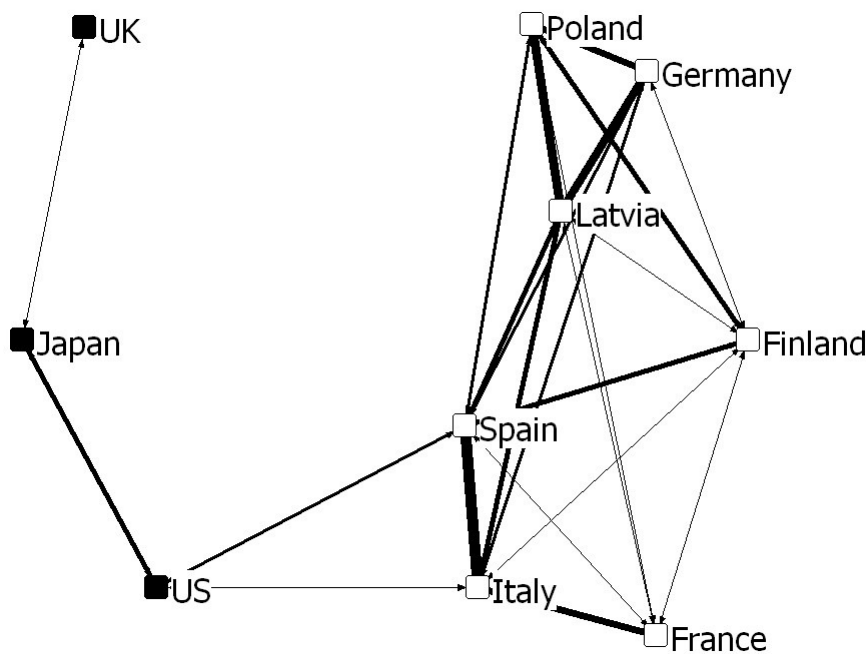
<sup>130</sup> See COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9, ch. 10.

<sup>131</sup> *Id.* ch. 6.

verse assortment of rules or doctrines, ranging from capital maintenance rules, rules regulating the payment of dividends, directors' duties, the "piercing the corporate veil" doctrine, and fraudulent conveyance laws.<sup>132</sup>

Finally, it is difficult to adduce why in a particular jurisdiction there were more "unclear" results indicated by the national reporters than in others. However, it may make sense that in U.K. corporate law there are no unclear results, reflecting its long history of codification and case law. Another factor is that in some jurisdictions a fact-specific situation or legal issue may not have been addressed in statute, a commercial code, or case law. As such, the absence of a default rule may be unsurprising, particularly in the newly acceded EU states included in the study.

FIGURE 3: NETWORK BASED ON SIMILARITY OF RESULTS (WITH TWO CLUSTERS)



As in the previous sections, the data can be transformed into a difference matrix, available in the online supplement,<sup>133</sup> which is then used to produce a new network picture, Figure 3. It can be seen that the legal systems from continental Europe all feature in one half of Fig-

<sup>132</sup> *Id.* ch. 7.

<sup>133</sup> See Cabrelli & Siems, *supra* note 81.



ure 3. In particular, Germany, Poland, and Latvia are relatively close since they have slightly lower shareholder protection but all score well in the creditor protection variable (see Table 5). Italy and Spain are also very close to each other. The other three countries are relatively different from this continental group. This also includes the United Kingdom, reflecting the differences in minority shareholder protection (see Table 5). Interestingly, the United States is relatively close to Japan but not to the United Kingdom.

Finally, as in the previous sections, we calculated the division into clusters. The best “fit” is achieved with two clusters.<sup>134</sup> As illustrated by the colors of the network in Figure 3, we see the group of continental European countries, with the other cluster comprising the United Kingdom, the United States, and Japan.

### ***E. The Relationship between Legal Rules, Sources of Law, and Results***

Since the three “difference matrices” use the same measure (namely, how different each of the countries is from the others), they are useful tools for a combined analysis of legal rules, sources of law, and results. To start with, one can simply sum up the data and identify which pairs of countries are most similar. When the pairs are ranked, the result of this operation is that Latvia, Poland, Finland, Spain, and Italy are fairly similar since these countries share at least three of the top ten links with each other. Germany and France each have one of the top ten links, with Poland and Italy respectively. Finally, the United Kingdom, the United States, and Japan are at the periphery with no close links.<sup>135</sup>

It may be a surprise to learn that none of the “main” legal systems is at the center. Yet this outcome is not implausible since Latvia, Poland, Finland, Spain, and Italy have been influenced by the “main” countries, thus explaining their relative similarity. Figures 1 to 3 also show this result since these same five countries are usually at the center. It also confirms another quantitative study by one of us, which found that with respect to creditor

---

<sup>134</sup> The precise numbers are fit -0.765 and *r*-square 0.584.

<sup>135</sup> The precise figures are (from 0—identical to 60—completely different): LAT–POL 17.33, SPA–ITA 19.34, SPA–LAT 20.5, LAT–ITA 22.17, FRA–ITA 22.51, SPA–POL 23.83, GER–POL 23.84, ITA–FIN 24.5, SPA–FIN 24.67, LAT–FIN 24.84. For the country abbreviations, see *supra* note 85.

and shareholder protection in twenty-five countries, transplant countries were typically the countries most similar to the other twenty-four.<sup>136</sup>

In addition, it is interesting to examine the relationship between these three categories. First, we calculated whether and how formal rules, sources of law, and results are correlated (i.e. from -1 to 1). The correlation between the sources of law and the other two categories is positive yet relatively modest (0.37 and 0.42), but there is a strong positive correlation between formal legal rules and results (0.84). Of course correlation does not imply causation. Thus, secondly, we also calculated the extent to which the differences in results are *determined* by the differences in formal rules and/or the sources of law. The resulting regression shows that the legal rules are strongly significant but the sources of law are not.<sup>137</sup>

This regularity does not mean that the content of the legal rules is automatically reflected in the results. This may be due on the one hand to the fact that the positive law may be similar but applied differently, for instance because a legal transplant does not work as well as it does in the origin country (“transplant effect”).<sup>138</sup> On the other hand, it may be suggested that even where the positive law is different, the results may be similar since different legal rules can be functional equivalents.<sup>139</sup>

To assess this point, one may compare the mean differences of the three categories. These are 57% for formal rules, 46% for sources of law, and 50% for the results. Thus, considering the 7% gap between formal rules and results, it may follow that there are some formal differences which functionally lead to the same result. However, a problem with this reasoning is that in our dataset, the category results usually only had three options per com-

---

<sup>136</sup> Siems, *supra* note 89.

<sup>137</sup> Rules: standardized coefficient 0.8088; significance 0.000. Sources of law: standardized coefficient 0.0956; significance 0.256. The *r*-square is 0.7111. The relevant regression method for network data is called “QAP via full partialling.” See HANNEMAN & RIDDLE, *supra* note 89, ch. 18.

<sup>138</sup> For the latter point, see, e.g., Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); TT Arvind, *The “Transplant Effect” in Harmonization*, 59 INT’L & COMP. L.Q. 65 (2010). See also *supra* Part I.D.

<sup>139</sup> This is a frequent claim of comparative lawyers; see, e.g., Basil Markesinis, *The Destructive and Constructive Role of the Comparative Lawyer*, 57 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 438, 443 (1993) (“we must try to overcome obstacles of terminology and classification in order to show that foreign law is not very different from ours but only appears to be so”).

ponent (e.g. protecting shareholders, protecting directors, or “unclear”), whereas there were more options in the formal rules category.<sup>140</sup> Consequently, this feature of the dataset may be the main reason why there appear to be more differences in terms of formal rules.

A more suitable method for establishing the relationship between formal rules and results is to examine selected pairs of countries. This has been done in Table 6.

TABLE 6: DIFFERENCES FROM MEAN FOR SELECTED PAIRS OF COUNTRIES

	<i>GER–LAT</i>	<i>US–JP</i>	<i>UK–FRA</i>	<i>UK–GER</i>	<i>UK–US</i>
<i>Legal rules</i>	-1.38	-1.38	0.62	1.62	-0.38
<i>Sources of law</i>	2.37	-0.46	-2.29	-0.29	-1.13
<i>Results</i>	-4.93	-2.93	1.07	2.07	0.07

The table is to be read as follows: each column displays how similar the indicated countries’ laws are in the three categories. The point of comparison is the mean of the category in question. Thus, the negative number of -1.38 in the GER–LAT column indicates that Germany and Latvia are closer than average in terms of legal rules, while the number 2.37 means that with respect to the sources of law, Germany and Latvia are relatively different, as compared to the average.<sup>141</sup>

One might expect that Germany and Latvia, as well as the United States and Japan, have relatively similar formal rules since Latvia borrowed some of its corporate law from Germany, and Japan did the same from the United States. But perhaps these legal transplants did not come to function in the same way as in their original jurisdictions, as they became shaped by the socio-economic, political, and cultural context of the host jurisdictions.<sup>142</sup> Conversely, one may expect that the relationship between the United Kingdom on

<sup>140</sup> See generally *supra* Part II.D.

<sup>141</sup> This is due to the fact that case law and academic writings are more important in Germany; see *supra* Part III.C.

<sup>142</sup> See *supra* Part I.D.

the one hand and France and Germany on the other shows functional equivalence; due to their different legal traditions, they may have different legal rules, but the results could nonetheless be relatively similar.

Table 6, however, does not confirm these points. The country pairs of Germany–Latvia and the United States–Japan are closer in their results than in their legal rules, and the United Kingdom is more different than both France and Germany with respect to results than with respect to legal rules. It may also be surprising that, in terms of sources of law, the United Kingdom and France are even closer than the United Kingdom and the United States. Thus, the general theories of comparative law do not seem to hold in the context of corporate law. This sounds like a negative conclusion, possibly also due to the limitations of the present approach.<sup>143</sup> However, it may also be put in a more positive light, namely that there is no support for the proposition that transplanted laws cannot work as well as non-transplanted ones.<sup>144</sup>

A final point that can be examined is whether case law generates more different results than other sources of law, in particular statute law. Thus, first, the mean differences of the three categories were recalculated, focusing on the solutions that refer to case law. Here, the difference between formal rules is 43% (compared to 57% for all sources of law) and between the actual results is 53% (compared to 50% for all sources of law). This is not necessarily surprising. Topics where case law is important, such as directors' duties, may have legal rules that are fairly similar across countries. However, differences in the results may be more pronounced since courts are keen to apply these rules to the specific socio-economic context of the country in question.

Second, a recalculation was performed to determine whether courts have a greater tendency than legislatures to protect shareholders. The background to this question is that some have argued that the common law countries are better at protecting shareholders since their courts are more alive to the protection of property rights, whereas legislatures more

---

<sup>143</sup> See *supra* Part III.A.

<sup>144</sup> It may even be possible that sometimes they work better than in the country of origin. See Mathias Siems, *The Curious Case of Overfitting Legal Transplants*, in *THE METHOD AND CULTURE OF COMPARATIVE LAW: ESSAYS IN HONOUR OF MARK VAN HOECKE* 133 (Maurice Adams & Dirk Heirbaut eds., 2014).

often pursue other aims, such as the redistribution of resources.<sup>145</sup> The data we have collected shows that 46% of the solutions with case law favor shareholder protection, whereas the figure falls to 42% in the case of all sources of law. Thus, there is (only) a slight difference.

Moreover, one can calculate which countries drive this result. For this purpose, the focus should be on France, Germany, Japan, the United Kingdom, and the United States, since only in these five countries were the national reporters' solutions based on case law to a considerable extent.<sup>146</sup> The results show that in France and Germany, court involvement is associated with an increase in shareholder protection, whereas in the other three countries, the tendency to protect shareholders is unaffected by the question of whether case law is relevant for one of the solutions.<sup>147</sup> Thus, according to our data, common law courts do not appear to be especially interested in the protection of shareholders.

The findings of this Part also have implications for the debate about harmonization in corporate law and the counterargument that it can only lead to formal harmonization and fails to respond to the need for functionally equivalent legal rules. Yet, our results do not confirm such skepticism. It was not possible to confirm functional similarity with formal dissimilarity (or formal similarity with function dissimilarity) which also means that it was not possible to find a "transplant effect" in countries that have been influenced by foreign legal rules. In addition, there is a strong positive correlation between the content of legal rules and the actual results: thus, formal harmonization can work insofar as law-makers possess a willingness to achieve common standards, for instance in the protection of shareholders or creditors.

---

<sup>145</sup> See, e.g., Thorsten Beck & Ross Levine, *Legal Institutions and Financial Development*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 251 (Claude Menard & Mary M. Shirley eds., 2005).

<sup>146</sup> See *supra* Part III.C.

<sup>147</sup> The precise numbers are ("all observations"; "case law only"): Germany (0.38; 0.50), France (0.46; 0.61), the UK (0.53; 0.50), the US (0.23; 0.25), and Japan (0.46; 0.45).

## SUMMARY AND CONCLUSIONS

In this Article, we have shown how a case-based approach can contribute to comparative corporate law, by informing our understanding of the extent to which the legal systems explored have fundamentally similar corporate law rules and sources of corporate law, as well as the nature of the results reached on the application of such rules. The study was based on ten cases used in a wider research project<sup>148</sup> and their solutions in ten countries: eight European countries, the United States, and Japan. It may be suggested that further countries, for example from emerging economies or the developing world, should also have been included. Yet such an inclusion may have also been contentious, since the present comparison of market economies of the developed world has the advantage that it can assess the remaining differences against a baseline of similarity in terms of the countries' histories, societies, economies, and ideologies.<sup>149</sup> For example, if we had included a country such as China, a number of further considerations may have needed to be considered, such as the role of state ownership in corporate governance and the independence of the courts.

Yet, even limited to the countries discussed here, the following conclusions can be drawn from our findings. The first is that it is not possible to confirm a global convergence, in particular a general Americanization, of corporate laws. According to our data, there is some evidence of legal transplants, for example as regards the relationship of Japanese to U.S. corporate law. Yet, overall, in all three categories—legal rules, sources of law, and results—the United States is the outlier. Hence, we do not find evidence for Hansmann and Kraakman's view of "an end of history for corporate law" with the modern U.S. model of corporate law having won the day.<sup>150</sup> Moreover, it would appear that both the United States and Japan are relatively different from the European countries of the study, thus raising some doubts about a global convergence of corporate laws.

---

<sup>148</sup> COMPARATIVE COMPANY LAW: A CASE-BASED APPROACH, *supra* note 9.

<sup>149</sup> For a similar line of reasoning, see Mark Warrington & Mark Van Hoecke, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 INT'L & COMP. L.Q. 495, 533 (1998); Neil J. Smelser, COMPARATIVE METHODS IN THE SOCIAL SCIENCES 66 (1976).

<sup>150</sup> See *supra* Parts I.B and III.D.

Secondly, the question of Europeanization of corporate law is more difficult to answer. There is some evidence that the EU Directives have led to some convergence of corporate laws. Still, the U.K. system of corporate law is a bit of an outlier in terms of the nature of the rules, the sources of those rules, and the outcome reached when such rules are applied. Moreover, it is remarkable that even the continental European countries differ considerably. For instance, while the two Eastern European countries of our study (Latvia and Poland) have transplanted some rules from other legal systems, there are still notable differences in the underlying sources of law, in particular in the role played by case law. There are also differences remaining in the protection of shareholders, even within continental Europe, with Spain providing less protection than the other civil law countries. Thus, while there is some evidence for the convergence of legal systems, even in a relatively homogeneous region such as the EU, there is no “end of history for corporate law.”

Thirdly, one should be skeptical about the role of legal families. There are some similarities between the United Kingdom and the United States in terms of sources of law, yet case law also plays an important role in Germany, France, and Japan. One of our findings shows that, possibly due to their more concentrated ownership structures, the civil law countries of continental Europe provide stronger protection for minority shareholders against the majority than do the United Kingdom and the United States. But, more generally, many of the similarities and differences in legal rules and actual results do not align with the categories of legal families. More specifically, the findings do not confirm the hypothesis that the case law of common law countries is a crucial determinant for their high levels of shareholder protection; rather, if case law has an influence on shareholder protection, according to our data, this appears to be most pronounced in France and Germany.

All of this also leads to the rejection of the findings by La Porta et al., who have claimed that the more robust shareholder protection of the common law countries is crucial to their more dispersed shareholder ownership and more developed capital markets.<sup>151</sup> As a consequence, it also seems misconceived to make the policy claim that a high level of

---

<sup>151</sup> See *supra* Part I.C.

shareholder protection (or perhaps particular types of legal rules) is essential for capital market development.